139-96

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 116.

NEWELL D. CLARK, PLAINTIFF IN ERROR,

vs.

JAMES L. BEVER, ADMINISTRATOR OF THE ESTATE AND EFFECTS OF GEORGE GREENE, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED SEPTEMBER 26, 1887.

in the nature of things be any such competition. The franchise to carry passengers is the property of the railroad. The contract of carriage is made with it. It is responsible for the life of its passengers, and it cannot be made to divide that responsibility with competing sleeping car furnishers.

In the second place, a contract of this sort is necessarily exclusive in its nature. Every reason urged by this Court in the Express cases, 117 U. S., p. 23, why special contracts are necessary with express companies and why there should be only one express company on a railroad, apply with ten-fold force when applied to sleeping car companies.

In the one case nothing is at issue but money and property. In the other the health, the comfort and even the lives of countless human beings are at issue.

In the third place, if this article in this contract is illegal, it may be stricken out without affecting the validity or operative effect of the contract in the least.

In the fourth place, that part of this contract is not in issue in this case, and no help is asked from it and no attempt is being made to enforce it.

We ask that the judgment may be affirmed.

Respectfully submitted,

EDGAR H. FARRAR,
B. F. JONAS,
ERNEST B. KRUTTSCHNITT,
Counsel for Defendant in Error.

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1 UNITED STATES OF AMERICA,
Southern District of Iowa, Eastern Division.

Pleas before the circuit court of the United States for the southern district of Iowa, eastern division thereof, at a term begun and holden at Keokuk, in said division of said district, on the third Tuesday, to wit, Tuesday, June 21st, A. D. 1887, before the Honorable J. M. Love, judge of the United States district court for said district, sitting as circuit judge.

NEWELL D. CLARK
vs.
JAMES L. BEVER, Administrator of the Estate of George Greene, Dec'd. } At Law.

Be it remembered that heretofore, to wit, on the 5th day of July, A. D. 1881, a petition was filed in the office of the clerk of the circuit court in and for Linn county, Iowa, sitting as a court of probate, in the words and figures following, to wit:

THE STATE OF IOWA,
Linn County.

2 NEWELL D. CLARK, Claimant,
vs.
WM. GREENE, Administrator of the Estate of George Greene, Dec'd. } Claim against said Estate. Sworn to and Filed under the Statute.

Petition in Probate.

To the circuit court of said county and State, sitting in probate:

The plaintiff claims of the defendant the sum of sixty-five thousand five hundred twenty-three and $\frac{20}{100}$ dollars, with interest thereon, at the rate of seven per centum per annum in gold coin, from the fourth day of June, A. D. 1878, and costs, and for cause of such claim states that on or about the said fourth day of June, 1878, a judgment of the circuit court of Linn county and State of Iowa was rendered in favor of this plaintiff and against the Burlington, Cedar Rapids and Minnesota Railway Company for the sum of sixty-five thousand five hundred and seventeen dollars, with costs, amounting to six and $\frac{20}{100}$ dollars, and interest, at the rate of seven per centum per annum in gold coin, from the date of said judgment; that the said judgment is entered of record in the default-record book numbered one, at page 516, of the records of said court, and is still in full force, unsatisfied, unreversed, not vacated nor appealed from, and still the property of the plaintiff, and a copy of the same is hereto annexed, marked "Exhibit A," and made a part hereof; that on or about the twenty-second day of July, A. D. 1880,

3 the plaintiff caused a writ of execution to issue upon the said judgment — of the office of the clerk of said court, and the said writ was placed in the hands of the sheriff of said

county of Linn for levy and collection, and a copy of the same is hereto annexed, marked "Exhibit B," and made a part hereof; that the said sheriff being unable to find any property belonging to the defendant in said judgment, the said Burlington, Cedar Rapids and Minnesota Railway Company made a demand upon S. P. Wisner, the last vice-president of said railway company, and upon Wm. Greene, the general superintendent of said company, that property be shown said sheriff belonging to said railway company upon which levy might be made under said writ of execution, and that said vice-president and general superintendent failed and neglected to point out any such property upon which levy could be made, as will more fully appear from the return of said writ, a copy of which is hereto annexed, marked "Exhibit C," and made a part hereof; that the said Burlington, Cedar Rapids and Minnesota Railway Company, at the time said judgment was rendered and prior thereto, was and still is a corporation organized and existing under the laws of Iowa, and that the said decedent, George Greene, at the time said demand to be shown property upon which to levy was made and prior and subsequent thereto and up to the time of his death, was the owner of nine hundred and ten shares of the capital stock of said railway company, each of said shares being of the value of one hundred dollars, and that the said shares are still the
4 property of said decedent's estate; that of the value of said shares of stock owned by said decedent there has been paid only the sum of eighteen thousand two hundred dollars or about twenty per centum of the full value of said stock, and there is still due upon said shares a balance of eighty per centum of their full value, amounting to the sum of seventy-two thousand and eight hundred dollars; that the said balance due upon said shares was a trust fund in the hands of said decedent for the payment of said judgment and is still a trust fund for the purpose in the hands of decedent's administrator; that the defendant herein is the administrator of the estate of said George Greene, deceased, duly appointed and qualified; that said decedent in his lifetime failed and neglected to pay or cause to be paid the said judgment or any part thereof and this defendant has failed and neglected to pay or cause to be paid the same or any part thereof, and the said judgment is still due and wholly unpaid.

Wherefore the plaintiff prays judgment against said defendant, as administrator of said estate, for the said sum of sixty-five thousand five hundred twenty-three and $\frac{20}{100}$ dollars, as claimed, with interest, as claimed, and costs, and asks that the same be allowed by the court as a just claim against said estate.

(Signed) P. HENRY SMYTHE & SON,
Attorneys for Plaintiff.

5 "EXHIBIT A."

STATE OF IOWA, } ss:
Linn County, }

Be it remembered that at a term of the circuit court within and

for the county and State aforesaid, begun and holden at the courthouse, in the city of Marion, on the 2nd day of June, A. D. 1878, Hon. John McKean, sole judge of the eighth judicial — of said State, presiding, on the 2nd day of said term, it being the 4th day of June, A. D. 1878, among other the following proceedings were had, done, and entered of record, to wit:

NEWELL D. CLARK
vs.
B., C. R. & M. R'Y Co. } No. 2936.

And now, at this day, to wit, June 4th, A. D. 1878, comes the plaintiff, by his attorney, and the said defendant, though duly served with process and here solemnly called, comes not, but makes default.

Whereupon the defendant is adjudged to be in default, and it is considered by the court that the plaintiff ought to recover by reason of the premises the amount due on the fifty bonds and coupons described in his petition, which by order of the court is assessed by the clerk and found to be in the sum of sixty-five thousand five hundred and seventeen dollars and — cents.

It is therefore considered by the court that the said plain-
6 tiff have and recover of the said defendant the said sum of sixty-five thousand five hundred and seventeen dollars and — cents, together with interest at the rate of seven per cent. per annum in gold coin, and costs herein expended, taxed at six dollars and twenty cents, and that execution issue therefor.

"EXHIBIT B."

Execution.

STATE OF IOWA, }
Linn County. }

To the sheriff of Linn county, Greeting:

Whereas a judgment against the Burlington, Cedar Rapids and Minnesota Railway Company for the sum of sixty-five thousand five hundred and seventeen dollars and — cents damages, with interest at the rate of seven per cent. per annum and six dollars and twenty cents costs, was rendered in the circuit court for said county, at the courthouse, in Marion, on the 4th day of June, A. D. 1878, in an action wherein Newell D. Clark was plaintiff and The Burlington, Cedar Rapids and Minnesota Railway Company defendant, and it appearing from the record of said cause that all of said judgment, the interest thereon, and the costs still remain unpaid, these are, therefore, in the name and by the authority of the State of Iowa, to command
you that of the goods, chattels, lands, and tenements of said
7 defendant, if sufficient be found in your county which are not exempt from execution, you cause to be made the said sum, with interest thereon, and costs and accruing costs by levy and sale thereof according to law, and have you said sums of money before us within seventy days from the date hereof to render unto those

who may be legally entitled thereunto, and have you then and there this writ, with a return of your doings in the premises hereon endorsed or annexed.

Witness my hand and the seal of said court, hereto affixed at Marion, in said county, this 22nd day of July, A. D. 1880.

[SEAL.] (Signed) GEO. L. STEARNS,
Clerk of Circuit Court, Linn County.

"EXHIBIT C."

STATE OF IOWA, } ss:
Linn County, }

This execution came into my hands on the 10th day of August, 1880, and I hereby certify that I made a demand to be shown property upon which to levy upon Wm. Greene, gen'l superintendent of the Burlington, Cedar Rapids & Minnesota Railway Co., and S. P. Wisner, vice-president of the above-named railway Co., and they failed to point out any property, and I return this execution unsatisfied in Rapids township, Linn county, Iowa.

(Signed) A. F. YAMBERT,
Sheriff of Linn Co., Iowa,
By ED. L. SWEM,
Dept. Sheriff.

8 STATE OF OHIO, } ss:
County of Portage, }

I, Newell D. Clark, being duly sworn, depose and say that I am the plaintiff herein; that I have read the foregoing petition, and that the allegations thereof are true, as I verily believe; that the said judgment debt is correct and just claim against the estate of George Greene, deceased, for the amount still unpaid upon said shares of stock, and I know of no set-off nor counter-claim against the same.

(Signed) NEWELL D. CLARK.

Subscribed in my presence and sworn to before me by the said Newell D. Clark this 30th day of June, A. D. 1881.

[SEAL.] (Signed) W. D. THOMAS,
Notary Public, Portage Co., Ohio.

On reading the foregoing petition and claim, ordered that the hearing of the said claim be fixed for the 9th day of August, 1881, at 2 o'clock p. m., at the court-house, in Marion, Linn county, Iowa, and that ten days' notice of the hearing thereof be served upon the administrator, accompanied with a copy of the petition and of this order; notice to be served in the manner required for commencing ordinary proceedings.

Done at chambers, in Marengo, Iowa county, Iowa, this 14th day of July, 1881.

(Signed) C. HEDGES,
Judge Circuit Court, 8th Judicial Dist.

Endorsed: Filed July 5th, 1881. Geo. L. Stearns, clerk.

9 And afterwards there was filed in the office of the clerk of Linn county a notice in the words and figures following, to wit:

Original Notice.

In the Circuit Court of Linn County, Iowa. In Probate. In Vacation.

NEWELL D. CLARK, Plaintiff,
vs.
WM. GREENE, Admin'r of the Estate of Geo. Greene, Dec., Defendant.

To said defendant:

You are hereby notified that there is now on file in the office of the clerk of the circuit court of Linn county, Iowa, the petition of the plaintiff aforesaid, claiming of you the sum of sixty-five thousand five hundred twenty-three & $\frac{20}{100}$ dollars as money justly due from you as administrator of the estate of Geo. Greene, dec'd, and interest thereon, at the rate of seven per cent. per annum, from the fourth day of June, A. D. 1878, for unpaid installments on nine hundred and ten shares of the capital stock of the Burlington, Cedar Rapids & Minnesota Railway Company taken by the said Geo. Greene in his lifetime, plaintiff being a judgment creditor of said corporation and execution having been returned *nulla bona*.

You are also notified that the hearing thereof has been fixed by the judge of said court for the 9th day of August, 1881, in vacation, at the court-house, in Marion; a default will be entered
10 against you and judgment rendered thereon and said claim allowed to be levied of the property in your hands to be administered.

(Signed) P. HENRY SMYTHE & SON,
Attorneys for Plaintiff.

STATE OF IOWA, } *ss:*
Linn County, }

I hereby certify that this notice, together with a copy of the petition, came into my hands on the 18th day of July, 1881, and that on the 28th day of July, 1881, I served this notice on Wm. Greene, as administrator of the estate of Geo. Greene, dec'd, by delivering to him a true copy (he waived the reading) and delivered him a true copy of the petition on file in Cedar Rapids, said county and State.

(Signed) B. F. SEATON, *Sheriff,*
By N. E. IVES, *Deputy.*

Fees for serving notice & petition, 2.00, paid in full by P. Henry Smythe & Son.

B. F. SEATON,
Per N. E. IVES.

Endorsed: Filed Aug. 6th, 1881. Geo. L. Stearns, clerk.

And afterwards, to wit, on the 9th day of August, A. D. 1881, there was filed in the office of said clerk of Linn county, Iowa, by defendant objections to the jurisdiction of the court and motion to discontinue proceedings in vacation, which read in words and figures as follows, to wit:

11 Circuit Court of Iowa within and for Linn County.

NEWELL D. CLARK
vs.
WILLIAM GREENE, Administrator of the Estate of George Greene, Deceased. } In Vacation.

Claim in probate.

Objection to Jurisdiction by the Defendant and Motion to Discontinue Proceedings in Vacation.

Now comes William Greene, the administrator above named, by Hubbard, Clark & Dawley, his attorneys, and objects to the jurisdiction of the said court and of the judge thereof to hear or determine the above-entitled claim in vacation upon the following grounds:

1. The order of the honorable judge of this court, made at chambers on the 14th day of July, 1881, fixing the time of hearing of said claim for the 9th day of August, 1881, in vacation, is without authority of law and is null and void and confers no right or jurisdiction upon said court or upon the judge thereof to hear or determine said claim at the time aforesaid, the same being in vacation.

2. It does not appear that the said order of the said honorable judge has been complied with by the claimant.

3. The said court is only open for the establishment of
12 claims against the estates of deceased persons at such regular, special, or adjourned terms thereof as are authorized by law and held in conformity to law.

4. The defendant administrator therefore moves that this proceeding in vacation be discontinued, and that the said order of the said honorable judge directing the same in vacation be set aside and held for naught as having been made without authority of law.

(Signed) HUBBARD, CLARK & DAWLEY,
Att'ys for Def't.

Endorsed: Filed Aug. 9th, 1881. Geo. L. Stearns, clerk.

On the same day, to wit, on the 9th day of August, A. D. 1881, a motion for trial by jury was filed in this case in said circuit court of Linn county, Iowa, which reads in words and figures following, to wit:

Circuit Court of Iowa within and for Linn County.

NEWELL D. CLARK
vs.
WILLIAM GREENE, Administrator of the Estate of George Greene, Deceased. } In Vacation.

Claim in probate.

Motion of Trial by Jury.

Now comes the above-named administrator, defendant herein, and, not waiving his objections heretofore filed to the juris-
13 diction of the said court and the honorable judge thereof to proceed herein in vacation, but expressly insisting upon said objections, moves the said court and the said honorable judge thereof for a trial of the issues upon said claim by a jury drawn, selected, and empannelled in accordance with law upon the following grounds:

1. Plaintiff's claim is based upon an alleged right of action at common law, and the administrator, defendant herein, is by the constitution of Iowa guaranteed the right of trial by jury upon the issues herein and upon said claim.

2. So much of the statute as authorizes the court to award a trial by jury in its discretion upon claims against the estates of deceased persons has no reference to claims founded upon rights of action at common law.

3. If the statute authorizes or purports to authorize the court to refuse a trial by jury of claims founded upon common-law rights of action the statute is in this behalf repugnant to the constitution of Iowa, and void.

(Signed) HUBBARD, CLARK & DAWLEY,
Att'ys for Def't.

Endorsed: Filed Aug. 9th, 1881. Geo. L. Stearns, clerk.

Afterwards, on the same day, to wit, on the 9th day of August, A. D. 1881, a record entry or order of the judge of said circuit court of Linn county, Iowa, was made in this cause, which reads in words and figures following, to wit:

14 In Chambers, at Marion, Iowa, August 9th, 1881, 2 o'clock p. m.

NEWELL D. CLARK
vs.
WM. GREENE, as Administrator of the Estate of Geo. Greene, Deceased. } Order of Judge.

Now, at 2 o'clock p. m., appeared Messrs. Smythe & Son, for plaintiff, and Messrs. Hubbard, Clark & Dawley, att'ys for defendant.

Pl'ff filed objections to jurisdiction of court and motion to discontinue cause; overruled; to which ruling defendant excepts.

Def't filed motion for trial by jury.

Ordered that trial be had by jury, and ordered that for such pur-

pose the hearing be continued until the next regular term of this court.

Defendant filed motion for rule on pl'ff to give security for costs, which was confessed by pl'ff.

Amount of bond fixed at $200.00, to be filed by 1st day of next term.

(Signed) C. HEDGES, *Judge.*

Endorsed: Filed Aug. 9th, 1881. Geo. L. Stearns, clerk.

15 Afterwards, to wit, on the 4th day of January, A. D. 1882, a petition for removal to the circuit court of the United States for the district of Iowa was filed in said cause in said circuit court of Linn county, Iowa, which reads in words and figures following, to wit:

In the Circuit Court of Linn County and State of Iowa.

NEWELL D. CLARK, Plaintiff,
vs.
WM. GREENE, Administrator of the Estate of Geo. Greene, Dec'd, Defendant.

Claim in probate.

Petition for Removal to the Circuit Court of the United States for the District of Iowa.

To said circuit court of Linn county, Iowa:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of Ohio; that the said Geo. Greene at the time of his death was a citizen of the State of Iowa; that the said Wm. Greene, administrator, defendant

16 herein, at the time of the commencement of this suit was and still is a citizen of the State of Iowa, and that the said Wm. Greene was prior to the commencement of this suit appointed and qualified as administrator of the estate of Geo. Greene, deceased, by the authority of said circuit court of Linn county, Iowa, and is now acting as such administrator by virtue of letters of administration issued under said authority, this being the appearance term to which said suit was brought.

And your petitioner offers herewith a bond, with good and sufficient sureties, for his entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit and paying all costs that may be awarded by said court of the United States if said court shall hold that this suit was wrongfully or improperly removed thereto; and he prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to

cause the record therein to be removed into said circuit court of the United States in and for the district of Iowa; and he will ever pray.

(Signed) P. HENRY SMYTHE & SON,
Petitioner's Att'ys.

Endorsed: Filed Jan'y 4th, 1882. Geo. L. Stearns, clerk.

17 On the same day, to wit, January 4th, 1882, the bond for removal was filed herein, which reads in words and figures following:

Know all men by these presents that I, Newell D. Clark, as principal, and Lyman Cook, as sure*ties*, are held and firmly bound unto Wm. Greene, administrator of the estate of Geo. Greene, deceased, in the penal sum of three hundred dollars; the payment whereof, well and truly to be made unto the said Wm. Greene, adm'n'r, his heirs, assigns, and successors, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions: The said Newell D. Clark having petitioned the circuit court of Linn county, State of Iowa, for the removal of a certain cause therein pending, wherein he is plaintiff and the said Wm. Greene, adm'r, is defendant, to the circuit court of the United States in and for the district of Iowa: Now, if the said Newell D. Clark, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands this 22nd day of December, A. D. 1881.

(Signed) N. D. CLARK,
By P. HENRY SMYTHE & SON, *His Att'ys.*
LYMAN COOK.

Endorsed: Bond for removal. Filed and approved Jan'y 4, 1882.

18 Afterwards, to wit, on the 10th and 27th days of January, A. D. 1882, record entries were made in this cause in said circuit court of Linn county, Iowa, and which, with the certificate of the clerk of said Linn county, Iowa, read in words and figures following, to wit:

Transcript of Record.

STATE OF IOWA, } ss:
Linn County, }

Be it remembered that at a term of the circuit court within and for the county and State aforesaid, begun and holden at the court-house, in the city of Marion, on the 2nd day of January, A. D. 1882,

Hon. Christian Hedges, sole judge of said circuit court, as a court of probate, of the eighth judicial district of said State, presiding, on the 22nd day of said term, it being the 27th day of January, A. D. 1882, among other the following proceedings were had, done, and entered of record, to wit:

NEWELL D. CLARK
vs.
WM. GREENE, Administrator of the Estate of Geo. Greene, Dec'd.

And now, to wit, January 10th, 1882, this cause comes on for hearing upon the petition and bond of the plaintiff asking that this cause may be removed to the United States circuit court for the northern division of Iowa, the plaintiff appearing by his attorneys, P. Henry Smythe and Son, and the defendant appearing by
19 his attorneys, Hubbard, Clark & Dawley, and, the court having heard the arguments of the respective counsel, said matter is submitted on the part of the plaintiff and taken under advisement by the court.

And now, to wit, January 27th, 1882, this cause comes on for the ruling of the court upon the petition for the removal of this cause to the United States circuit court, the same having been heretofore submitted and taken under advisement by the court, and, the court being fully advised and satisfied in the premises, it is therefore ordered that this cause be, and the same is hereby, transferred to the United States circuit court for the northern division of Iowa, to be held at Dubuque, Iowa, and that the clerk of this court certify the same as provided by law.

Court costs:

Clerk circuit court Linn Co., Ia	$3 75	
Clerk circuit court, costs for transcript	6 00	
B. F. Seaton, sheriff of Linn Co.	3 60	pd by pl'ff's att'ys.
	$13 35	

STATE OF IOWA, }
Linn County, } *ss:*

I, Geo. L. Stearns, clerk of the circuit court of the State of Iowa in and for said county, do hereby certify that the foregoing is a true copy of the papers in the above-entitled cause, together with fee bill, as fully as the same remains on file and of record in my
20 office.

Witness my hand and the seal of said court hereto
[SEAL.] affixed, at my office, in Marion, in said county, on this 27th day of March, 1882.

(Signed) GEO. L. STEARNS, *Clerk.*

And afterwards, to wit, on the 9th day of May, 1882, there was filed in the United States circuit court for the central division, district of Iowa, a stipulation, which reads in words following, to wit:

In the Circuit Court of the United States for the District of Iowa, Northern Division.

N. D. CLARK
vs.
WM. GREENE, Administrator.

Stipulation.

It is hereby stipulated that the record in the above-entitled cause, removed from the circuit court of Linn Co., Iowa, shall be filed and docketed at Des Moines, in the central division, instead of Dubuque, in the northern division, and shall proceed therein the same as if said cause had been originally removed thereto.

(Signed) P. HENRY SMYTHE AND SON,
Pl'ff's Att'ys.
HUBBARD, CLARK & DAWLEY,
Att'ys for Def't.

21 Afterwards, to wit, on the 25th day of October, 1882, a motion to remand the cause from the Federal court to the State court was filed in the office of the clerk of the United States circuit court, at Des Moines, in the central division, district of Iowa, which reads in words following:

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

NEWELL D. CLARK
vs.
WM. GREENE, Adm'r. } 3007. Law.

Motion to Remand.

Comes defendant herein and moves the court to remand this cause to the circuit court of Linn county, Iowa, from whence it was removed, upon the following grounds:

1. This is a claim in probate and is not such a suit or controversy as is removable to this court under any act of Congress.

It is inseparably connected with the settlement of the estate and the marshalling and distribution of its assets.

(Signed) HUBBARD, CLARK & DAWLEY,
Att'ys for Def't.

Endorsed: Filed Oct. 22, 1882. E. R. Mason, clerk.

22 Afterwards, to wit, at the October term of the circuit court of the United States for the district of Iowa, holden at Des Moines, in the central division, a record entry was made in this cause, which reads in words and figures as follows:

United States Circuit Court, Central Division, Southern District of Iowa. October Term, 1882.

NEWELL D. CLARK
vs.
WILLIAM GREENE, Adm'r, &c. } No. 3007. Law.

THURSDAY, *November* 9, 1882.

This cause came on this day for hearing—plaintiff appears by P. Henry Smythe and defendant by Hubbard, Clark and Dawley—and, by consent of parties, it was ordered that this cause be transferred to the eastern division of the southern district of Iowa upon payment of clerk's costs here.

A true copy.

Attest: [SEAL.] E. R. MASON, *Clerk.*

Afterwards, to wit, on the 12th day of February, A. D. 1883, an answer was filed in this cause in the office of the clerk of the United States circuit court for the southern district of Iowa, eastern division, at Keokuk, which reads in words and figures as follows, to wit:

23 In the United States Circuit Court, Southern District of Iowa, Eastern Division.

NEWELL D. CLARK
vs.
WILLIAM GREENE, Administrator of the Estate of George Greene, Deceased.

Answer.

For answer to plaintiff's claim and petition herein defendant states:

1. He denies each and every allegation in said claim and petition contained.

2. For further answer and defense defendant says that on the 12th day of July, 1880, he was duly appointed and qualified as administrator of the estate of George Greene, deceased, pursuant to an order of the circuit court of Linn county, Iowa, a copy of which is hereto annexed, marked Exhibit A, and made a part hereof, and that thereupon he gave notice of his appointment as administrator by publication for three weeks, terminating on the 29th day of July, 1880, as required by said order.

That the plaintiff's judgment is founded on certain bonds issued by the Burlington, Cedar Rapids & Minnesota Railway Company, known as income and equipment bonds; that said railway company became totally insolvent and ceased to do business in May, 1875, and has done no business and has not exercised or
24 used its franchises since that date; that since said date said railway company has had no corporate property whatever from which plaintiff's debt could be made, but has been totally worthless and insolvent except as to debts secured by first mortgages upon its property, and that plaintiff's debt was not so secured;

that the bonds upon which plaintiff's said judgment is founded became due and payable July 1st, 1875; that the plaintiff brought his suit on said bonds against said Burlington, Cedar Rapids & Minnesota Railway Company on the — day of ——, 1878, and recovered judgment in said action, as set forth in the plaintiff's petition, on or about the 4th day of June, 1878; that on said judgment the plaintiff caused execution to issue on the 22nd day July, 1880, and caused the same to be served on the 10th day of August, 1880, by making a demand to be shown property upon which to levy upon William Greene, general superintendent of said B., C. R. & M. R'y Co., and S. P. Wisner, vice-president thereof, the last elected officers of said company, who failed to point out any property; whereupon said execution was returned unsatisfied.

That this cause of action was not commenced against this defendant until the — day of August, 1881; wherefore defendant says that by reason of the facts in this division set forth the plaintiff's alleged cause of action is fully barred by the statutes of limitations of Iowa in that behalf.

3. For further answer and defense defendant says that plaintiff's judgment is founded on certain bonds issued by the Bur-
25 lington, Cedar Rapids & Minnesota Railway Company, and that plaintiff's claim or supposed cause of action has been compromised, settled, discharged, and fully paid off by the Burlington, Cedar Rapids & Northern Railway Company, successor of said Burlington, Cedar Rapids & Minnesota Railway Company, who issued said bonds; that plaintiff had a lien on said railway and might well have enforced the same, but surrendered it voluntarily in settlement with the said Burlington, Cedar Rapids & Northern Railway Company; a copy of which settlement is hereto annexed, marked Exhibit B, and made a part of this answer; and plaintiff thus released the property of said Burlington, Cedar Rapids & Minnesota Railway Company held for the payment of said bonds, and cannot now maintain an action against defendant for want of property on the part of said railway company.

Wherefore defendant demands judgment for his costs.

(Signed) HUBBARD, CLARK & DAWLEY,
Att'ys for Def't.

EXHIBIT "A."

Circuit Court of Iowa within and for Linn County.

Estate of GEORGE GREENE, Deceased.

And now, to wit, July 12th, 1880, was filed herein a petition; and on the same day comes Wm. Greene and files herein his bond as administrator of said estate in the sum of seventy-five thousand
dollars, with good and sufficient sureties, in accordance with
26 the foregoing order, and, he having taken the oath required by law, said bond is therefore approved and said William Greene is hereby appointed as such administrator and letters issued

to him accordingly; and it is further ordered that said administrator give notice of his appointment by publication in the Cedar Rapids Republican for the space of three weeks.

EXHIBIT "B."

Auditor's No., 1823.

Operating Expense Burlington, Cedar Rapids & Northern Railway Co. of Iowa.

To M. C. McArthur, A. D. Clark, 1st Nat'l Bank of Garrettsville, Ohio, Dr.

Residence, Iowa and Ohio.

DEC. 21, 1880.

For settlement in full of the claim in suit on one hundred and four B., C. R. & M. R'y income and equipment bonds for redemption from judicial sale of Pacific Division of B., C. R. & N. R'y; also in full satisfaction and release of all claims or demands against said B., C. R. & N. R'y Co. or against any of its railway or other property by reason of the execution and delivery of said income and equipment bonds, said suit to be dismissed both in Federal and State courts where brought or is now pending in State or district of Iowa.

$14,000.00.

Examined and entered folio 34.

(Signed) J. G. BROEKSMIT, *Auditor.*

27 I hereby certify that the above account is correct, was duly authorized, and is hereby approved.

(Signed) J. TRACY, *Pres't.*

Received Dec. 21st, 1880, of Burlington, Cedar Rapids & Northern Railway Co. of Iowa fourteen thousand dollars in full of the above account.

$14,000.00.

(Signed) P. HENRY SMYTHE & SON,
Attorneys for the Above-Named Parties.

Endorsed: Filed February 12th, 1883. H. K. Love, clerk.

Afterwards, to wit, on the 10th day of July, A. D. 1883, a stipulation to continue was filed in this cause in the office of the clerk of the United States circuit court for the southern district of Iowa, eastern division, at Keokuk, which reads in words as follows, to wit:

United States Circuit Court, Southern District of Iowa, Eastern Division.

NEWELL D. CLARK
vs.
WILLIAM GREENE, Adm'r.

Stipulation.

It is stipulated and agreed in the above cause that the same shall be continued at the request of the defendant, and that this
28 continuance shall in no manner prejudice the rights of the plaintiff in said cause.

(Signed) HUBBARD, CLARK & DAWLEY,
For Def't.
P. HENRY SMYTHE & SON,
Att'ys for Pl'ff.

And it was so ordered accordingly.

Endorsed: Filed July 10th, 1883. H. K. Love, clerk.

Afterwards, to wit, at the January term, 1884, of said court and on the 16th day of January, 1884, a record entry was made in this cause, which reads in words following, to wit:

NEWELL D. CLARK
vs.
WILLIAM GREENE, Adm'r, &c. } Law. No. 57. Debt.

This cause came on to be heard upon motion of the defendant to continue; Hubbard, Clark & Dawley, attorneys for defendant; P. Henry Smythe & Son, att'ys for plaintiff. The court, being advised in the premises, sustains the motion.

Afterwards, to wit, at the June term, 1884, of said court and on the 1st day of July, 1884, a record entry was made in this cause, which reads in words following, to wit:

NEWELL D. CLARK
vs.
WILLIAM GREENE, Adm'r. } Law. No. 57. Debt.

29 This cause is continued upon application of defendant; Hubbard, Clark & Dawley, attorneys for defendant; P. Henry Smythe & Son, attorneys for plaintiff.

Afterwards, to wit, on the 18th day of April, 1885, a replication was filed in this cause in the office of the clerk of the United States circuit court for the southern district of Iowa, eastern division, at Keokuk, which reads in words and figures as follows, to wit:

In the Circuit Court of the United States for the Southern District of Iowa, Eastern Division.

NEWELL D. CLARK, Plaintiff,
vs.
WILLIAM GREENE, Administrator of Estate of George Greene, Deceased, Defendant.

Reply.

1. Plaintiff, for reply to the 2nd paragraph of defendant's answer, denies that plaintiff's petition herein was not filed till the — day of August, 1881, and pl'ff refers to the filing by the clerk for greater certainty. Plaintiff further says that on the 11th day of April, 1881, plaintiff filed his petition and claim, duly sworn to, in the circuit court of Linn county, Iowa, against the said defendant, William Greene, as administrator of the estate of Geo. Greene, deceased, alleging and setting up the same identical facts as are herein
30 in pl'ff's petition pleaded as a cause of action, and asking that the same be allowed as a claim against said estate of Geo. Greene, deceased, and caused due and legal notice thereof to be served upon said defendant.

That plaintiff appeared at the June term, 1881, of said court, to wit, on the 13th day of June, 1881, and at the time required by law and the rules of court, to prove the allegations of his petition and was then and there ready so to do, but the defendant, instead of taking issue on the facts and pleadings to the merits, interposed a demurrer to said petition, alleging as ground of demurrer that said proceeding was a suit at law and not a claim in probate, and was therefore improperly brought, and that said court had not jurisdiction, and, upon argument and consideration thereof, said circuit court erroneously held sustaining said demurrer, whereby pl'ff was required to dismiss said suit and commence again; and plaintiff says that said suit was not dismissed by reason of any negligence of plaintiff in the prosecution thereof, but by reason of said erroneous ruling on said demurrer; and plaintiff says that immediately thereafter and at the time shown by the filing of the clerk on the petition herein pl'ff again commenced this suit on the same cause of action and the same was filed in time and is not barred by the statute on that subject. Plaintiff further says that as to the insolvency of said B., C. R. & M. R. W. Co. or when it ceased to do business or exercise its franchises, or whether it has since had corporate prop-
31 erty after July 1st, 1875, plaintiff has no knowledge or information sufficient to form a belief, and says that if such conditions existed at the time he had no notice thereof, and therefore denies the same.

2. Replying to the 3rd paragraph of said answer, plaintiff denies all the material allegations thereof and denies that he has done anything which in any manner releases defendant from his liability, and asks judgment.

(Signed) P. HENRY SMYTHE & SON,
Att'ys for Pl'ff.

THE STATE OF OHIO, } ss:
Portage County, }

I, Newell D. Clark, being duly sworn, on my oath do say that I am plaintiff in the foregoing-entitled cause; that I have read the above and foregoing reply, and the statements therein contained are true, as I verily believe.

(Signed) NEWELL D. CLARK.

Subscribed in my presence and sworn to before me by N. D. Clark this 14th day of April, A. D. 1885.

(Signed) W. B. THOMAS,
[SEAL.] *Notary Public, Portage Co., O.*

Endorsed: Filed April 18, 1885. H. K. Love, clerk.

Afterwards, to wit, at the June term, 1887, of said court and on the 23rd day of June, 1887, a supplemental petition was filed in this cause, which reads in words following, to wit:

31½ In the Circuit Court of the United States in and for the Southern District of Iowa, Eastern Division.

NEWELL D. CLARK, Plaintiff,
vs.
WM. GREENE, Adm'r Estate of Geo. Greene, Deceased, Def't.

Supplemental Petition.

Now comes plaintiff, and by leave of court, by way of supplemental petition, states—

That since the last term of this court the said defendant, Wm. Greene, administrator, has departed this life, and that by the action of the circuit court of Linn county in and for the State of Iowa, duly had, one James L. Bever has been duly and legally appointed and qualified as administrator *de bonis non* of the estate of the said George Greene, deceased, and the said James L. Bever, by leave of court, is hereby substituted as defendant in this case instead of said Wm. Greene, deceased; that the said James L. Bever has accepted said office and is now acting as such administrator; that the said James L. Bever is a citizen of the State of Iowa, while the plaintiff herein is a citizen of the State of Ohio, and the plaintiff now hereby reaffirms all of the statements and allegations of his petition herein as against the said James L. Bever, administrator as aforesaid, and asks that the same be adjudged in his favor, and that the claim set up in the
31¾ petition be allowed as against the said estate, and that he be required to pay the same out of the assets in his hands to be administered, and that pl'ff have judgment, as claimed.

(Signed) P. HENRY SMYTHE & SON,
Att'ys for Pl'ff.

And afterwards, to wit, at the June term, 1887, of the said circuit court of the U. S. and on the 23rd day of June, A. D. 1887, a record

entry was made in the above-entitled cause, and which reads as follows, to wit:

NEWELL D. CLARK, Plaintiff,
vs.
WM. GREENE, Adm'r Estate of Geo. Greene, Deceased, Defendant.

Order of Substitution.

Now, on this day, it being made to appear to this court that since the last term thereof Wm. Greene, administrator, defendant herein, has departed this life, and by the action of the circuit court of Linn county, in the State of Iowa, James L. Bever, of Linn county, Iowa, and a citizen of the State of Iowa, has been duly appointed as administrator *de bonis non* of the estate of George Greene, deceased, and has duly qualified and is now acting as such administrator instead and in lieu of the said Wm. Greene, deceased, it is ordered that the said James L. Bever be, and he is hereby, substituted as defendant herein and is required to appear herein and defend this cause of action, as required by law and the rules of this court, and that this cause hereafter proceed against him as such administrator.

32 Afterwards, to wit, at the June term, 1887, of said court and on the 29th day of June, 1887, a record entry was made in this cause, which reads in words following, to wit:

NEWELL D. CLARK
vs.
JAS. L. BEVER, Administrator of the Estate of George Greene, Deceased. } Debt.

This cause now coming on to be heard, plaintiff appearing by P. H. Smythe & Son, his attorneys, and by Anderson, Davis & Hagerman, and defendant by C. A. Clark, his attorney; and thereupon came a jury of twelve good and lawful men, who were duly empannelled and sworn to well and truly try the issues and whose names are as follows: A. N. Stevens, L. L. Therme, John B. Kiel, R. W. Rankin, Neri Ogden, Silas Lane, S. C. Gruwell, J. P. Yerger, H. J. Mills, J. C. Hanna, H. G. Coe, O. P. Newbranch, and after hearing of testimony the case was continued until further order of court.

33 Afterwards, to wit, at the June term, 1887, of said court and on the 11th day of July, 1887, a record entry was made in this cause, which reads in words following, to wit:

NEWELL D. CLARK
vs.
JAS. L. BEVER, Administrator of Estate of George Greene, Deceased. } Debt.

This cause having heretofore been referred to a jury for trial, and the testimony having been presented and heard, and argument of counsel having been heard, the same was continued until the fur-

ther order of the court in order that the court might consider certain questions of law presented.

And now, on this day, come the jury heretofore empannelled, and by instructions of the court return the following verdict: "We, the jury, find for the defendant."

Afterwards, to wit, on the 13th day of July, A. D. 1887, was filed a bill of exceptions in this cause in the office of the clerk of the United States circuit court for the southern district of Iowa, eastern division, at Keokuk, which reads in words and figures as follows, to wit:

In the Circuit Court of the United States for the Southern District of Iowa, Eastern Division.

NEWELL D. CLARK
vs.
JAMES L. BEVER, Adm'r Est. Geo. Greene, Deceased.

34 *Bill of Exceptions.*

Be it remembered that on the trial of this cause the plaintiff, in order to maintain the issue upon his part, introduced evidence as follows:

A duly certified copy of the judgment of the circuit court of Linn county, in the State of Iowa, of date June 4th, 1878, in favor of the plaintiff and against the Burlington, Cedar Rapids & Minnesota Railway Co. in words and figures following, to wit:

"NEWELL D. CLARK
vs.
"THE BURLINGTON, CEDAR RAPIDS & MINNESOTA R'Y CO. } No. 2936.

"And now, at this day, to wit, June 4th, 1878, comes the plaintiff, by his attorneys, and the said defendant, though duly served by process and here solemnly called, comes not, but makes default; whereupon the defendant is adjudged to be in default, and it is considered by the court that the plaintiff ought to recover by reason of the premises the amount due on the fifty bonds and coupons described in his petition, which by order of the court is assessed by the clerk and found to be in the sum of sixty-five thousand five hundred and seventeen dollars and no cents.

"It is therefore considered by the court that the said plaintiff have and recover of the said defendant the said sum of $65,517, together with interest at the rate of seven per cent. per annum, in gold coin, and costs herein expended, taxed at $6.20, and that execution issue therefor."

Plaintiff also introduced a writ of execution issued on the
35 twenty-second day of July, 1880, by the said circuit court of Linn county, directed to the sheriff of said county, commanding him to be caused to be made the said judgment, with interest and costs; also the return of said sheriff upon said execution in words and figures as follows, to wit:

"STATE OF IOWA, } ss:
"*Linn County,* }

"This execution came into my hands on the 10th day of August, 1880, and I hereby certify that I made a demand to be shown property upon which to levy upon Wm. Greene, general superintendent of the Burlington, Cedar Rapids & Minnesota Railway Co., and S. P. Wisner, vice-president of the above-named railway company, and they failed to point out any property, and I return this execution unsatisfied in Rapids township, Linn county, Iowa.

"A. F. YAMDART,
"*Sheriff of said County,*
"By E. A. S., *Deputy.*"

The plaintiff also introduced a certified copy of the petition filed in the circuit court of Linn county on the 10th day of May, 1878, in the case of this plaintiff against The Burlington, Cedar Rapids & Minnesota Railway Co., defendant, in which case the said judgment of June 4th was rendered, from which it was made to appear that the said suit was brought and based upon fifty bonds of one thousand dollars each, payable in gold coin, with seven per cent
36 interest, and of which the following is a true copy:

"$1,000. £200.

"Burlington, Cedar Rapids & Minnesota Railway Company income, equipment, and convertible mortgage gold bond, interest 7 per cent., payable in gold coin semi-annually, free of Government tax.

"The Burlington, Cedar Rapids & Minnesota Railway Co. of the State of Iowa promises to pay to The Farmers' Loan & Trust Co. of the State of New York or bearer the sum of one thousand dollars in United States gold coin of the present standard, to be paid through the agency of the said railway Co. in the city of New York, or the sum of two hundred pounds sterling, to be paid at an agency of the said company in the city of London, England, at the option of the holder hereof, on the first day of June, in the year one thousand nine hundred and fourteen, with interest on the said principal from the first day of June, 1874, at the rate of seven per cent. per annum in gold coin as aforesaid, free from any United States Government tax, payable at the said agency in the city of New York or in the city of London, on the first days of June and December in each year until the said principal shall be fully paid, on presentation and surrender of the annexed coupons as they shall respectively become due.

"If default be made in the payment of the interest on this bond according to its tenor and if such default shall continue for the period of six months after maturity and demand of payment, then and in that case the whole principal sum of this bond, to-
37 gether with all arrearages of interest, shall become due and payable in the manner provided for in the deed of trust. This bond is one of a series of two thousand bonds, numbered from one to two thousand, inclusively, each for one thousand dollars, and

amounting in the aggregate to the sum of two million dollars, and all of even date herewith, and secured by a deed of trust to the said Farmers' Loan & Trust Co., bearing the same date as this bond, which said deed of trust is a first mortgage upon the entire net income of said railroad company and upon the rolling stock and equipment mentioned in said deed of trust and any and all additions thereto, together with any and all replacements thereof that may hereafter be made, and in addition to being the first mortgage on the net income and equipment as aforesaid said trust deed also conveys, subject to existing liens and as further security for the payment of said bonds, the entire railroad of this company, its several branches and divisions, together with all its other property of every name and kind whatsoever, including its rights and franchises, in the manner and form expressed in said deed of trust, to which reference is hereby had for further information as to the manner in which said bond is secured. This bond is convertible, at the option of the holder, into the capital stock of said company at par at any time prior to the first day of January, 1900, upon surrender of the same with all the unpaid coupons not then due. This bond shall pass by delivery or transfer on the books of the company in
38 the city of New York after a registration of ownership is certified hereon by the transfer agent. No transfer except upon the books of the company shall be valid unless the last transfer be to bearer, which shall restore transferability by delivery, and it shall continue, subject to successive registrations, the transfer to bearer as aforesaid at the option of the holder. This bond shall not become obligatory unless the certificate endorsed hereon is signed by the trustees.

"In witness whereof the said railway Co. has caused its corporate seal to be hereto affixed and these presents to be signed by its president and treasurer and countersigned by its secretary on the first day of June, 1874.

"(Signed) GEO. GREENE, *President.*
"JOHN ELY, *Treasurer.*

"Countersigned.
D. W. C. ROWLEY, *Secretary.*"

To each of which are annexed eighty interest coupons, of which the following is a copy, the first of which came due Dec. 1st, 1874, and the 2nd June 1st, 1875:

"35. £7.

"Burlington, Cedar Rapids & Minnesota Railway Co. will pay the bearer, or, if registered, the registered holders hereof, at his option, $35 in coin at its agency in the city of New York, or seven pounds sterling at its agency in London, on the first day of June, 1877, interest on bond.

"(Signed) JOHN ELY, *Treasurer.*"

The plaintiff introduced testimony showing that about the
39 first of March, 1872, a certain corporation called "The Northwestern Construction Co." had a settlement with the Burling-

ton, Cedar Rapids & Minnesota Railway Co., an Iowa corporation, in reference to work which the said construction company had done in building the road of the railway company, and that upon that settlement (a tabulated copy of which was introduced) there was due to the construction company from the railway company seventy thousand dollars in cash under a contract which the railroad company had made with the construction company for building certain portions of its road; that the intestate, George Greene, was at the time of this settlement the president of the Burlington, Cedar Rapids & Minnesota Railway Co. and a stockholder therein; that at the same time he was a member of the construction company; that he continued to be president of the railway Co. until February, 1875; that at the time of the settlement aforesaid the railway company was unable to pay the seventy thousand dollars in money, and thereupon it was agreed that in lieu of said payment that it should deliver to the construction company thirty-five hundred shares of one hundred dollars each of its capital stock at twenty per cent. on the dollar in full payment of the indebtedness; that this stock was issued directly by the railway company to the members of the construction company; that the intestate, Geo. Greene, received as his share of said stock 910 shares, the shares being one hundred dollars each; that no other payment was made on account of said stock excepting the said twenty per cent. It was also shown by the evidence introduced by the plaintiff that Wm. Greene was appointed and qualified as administrator of the estate of Geo. Greene on the 12th day of July, 1880, said Geo. Greene having died shortly prior thereto; that said administrator, by said order of appointment, was required to give three weeks notice of the same; that he published notice thereof in the Cedar Rapids Daily and Weekly Republican, first on July 15, 1880, again on the 22 of the same month, and again on the 29th of the same month, which was all the notice given of his appointment.

The plaintiff introduced in evidence a petition, addressed to the said circuit court of Linn county, Iowa, setting up, in substance, the very same facts and matters as are set up in the petition herein and asking that the same be allowed as a claim against the estate of said Geo. Greene, deceased, said circuit court having exclusive probate jurisdiction in said county. Said petition was filed on the 11th day of April, 1881, said petition being the same as the one in this suit, excepting that at the heading thereof it was simply entitled "petition," while the — present suit is entitled "petition in probate," both being filed in the same court; also a certified copy of a demurrer which the defendant, Wm. Greene, administrator, interposed at the June term, 1881, of the said circuit court of Linn county to the said petition filed April 11th, which demurrer was as follows, to wit:

"Circuit Court of Iowa within and for Linn County.

"NEWELL D. CLARK
vs.
"WM. GREENE, Adm'r. } Demurrer.

41 "The defendant demurs to plaintiff's petition upon the following grounds: 1st. The supposed cause of action in said petition set forth is a claim against the estate of Geo. Greene, deceased, in probate, and no action at law can be maintained thereon. Signed by counsel."

Also the following record entries in said cause:

"And now, to wit, June 13th, 1881, this cause comes on for hearing upon the defendant's demurrer to plaintiff's petition, the plaintiff appearing by his attorneys, P. Henry Smythe & Son and J. D. Giffin, and the defendant appearing by his attorneys, Hubbard, Clark, & Dawley, and the court, having heard the arguments of the respective counsel, takes the matter under advisement.

"And now, to wit, June 23rd, 1881, this cause comes on for the ruling of the court upon defendant's demurrer to plaintiff's petition, the same having been argued and submitted to the court heretofore and taken under advisement, and the court, being fully advised and satisfied in the premises, sustains said demurrer; to which ruling of the court plaintiff excepts, and thirty days is hereby given plaintiff to elect whether to stand on his petition or amend.

"And now, to wit, July 5, 1881, come P. Henry Smythe & Son, attorneys for the plaintiff, and dismiss this action without prejudice and pay the balance of court costs."

It was also conceded by the counsel for defendant without proof that the said Wm. Greene was deceased, and that the defendant Bever had been appointed by the circuit court of Linn county, Iowa,
42 as administrator *de bonis non* of the estate of Geo. Greene, deceased, and had duly qualified and entered upon the duties of that office; that he was a citizen of the State of Iowa, and that the estate of Geo. Greene still remained unsettled

Plaintiff also introduced the articles of incorporation of the Burlington, Cedar Rapids & Minnesota Railway Co., adopted in 1868, showing that said company was a corporation regularly organized under the laws of the State of Iowa. The plaintiff also proved that said railway company continued to carry on business in its own name and under its corporate franchises by operating its road and carrying — its business as a railway company up to the 19th day of May, 1875, at the time a receiver was appointed.

The defendant introduced in evidence the following resolution, adopted by the executive committee of the Burlington, Cedar Rapids & Minnesota Railway Company, of date February 7, 1871:

"Resolved, That in the adjustment or liquidation of claims against the company the treasurer be authorized to use the stock of the com-

pany: Provided, That not less than twenty per cent. of the par value can be realized for the purpose."

Defendant proved that a receiver was appointed for the said railroad company on the 19th day of May, 1875; also at the time of the settlement between the railroad company and the construction company that the railroad company was unable to pay the $70,000, and that this stock had to take the place of a cash payment; that the construction company was reluctant to take the stock
43 ,and insisted upon payment in cash; that the transaction was made at the instance of Judge George Greene; that the stock was not worth anything in the market; that at the time of the issuance of the stock upon which it is sought to hold the estate of George Greene, deceased, the bonded indebtedness of the main line of the Burlington, Cedar Rapids and Minnesota Railway Company was $5,400,000. The said railway company also had at that time a floating indebtedness of over one-half million dollars; that the net earnings of the said railway company were not in 1871 or 1872 or at any time thereafter sufficient to pay the interest on its bonded indebtedness, but such net earnings were sufficient to pay part of the interest on the bonded indebtedness; that the said railway company in March, 1872, had no means of paying said floating debt or the interest on its bonded indebtedness except its net earnings and such proceeds as could be realized from its stock and bonds and by borrowing; that in May, 1875, when the receiver of the said railway company was appointed by the United States circuit court for the district of Iowa, its general condition was a bonded indebtedness of $10,400,000, upon which no interest had been paid since the first of November, 1873, and a floating indebtedness of about $1,250,000; that it then had no means of paying its said floating indebtedness; that the railroad and property of said company was sold at foreclosure sale in July, 1876, and had since that date been owned and operated by the Burlington, Cedar Rapids & Northern Railway Company; that after the appointment of the receiver, on
44 May the 19th, 1875, the said Burlington, Cedar Rapids & Minnesota Railway Company ceased to do business as a company and did not elect officers or exercise its franchises thereafter; also that on the 10th day of February, 1875, George Greene transferred to John I. Blair the 910 shares of stock before mentioned, and that the said John I. Blair was at that time a man of undoubted financial responsibility for any balance due on said stock.

The plaintiff in rebuttal introduced in evidence the deposition of JOHN I. BLAIR, showing that at the time of the transaction named the Burlington, Cedar Rapids & Minnesota Railway Co. was indebted to the Lackawanna Iron & Coal Co., of which the said Blair was a large owner, in a large sum for iron rails. Clews had failed, and the road was bound to go into bankruptcy unless something was done; that he was requested by the Western managers to take the presidency of the road and see if — could be extricated. They said that various parties had or would transfer to him a large amount of stock—at least a majority of it. The object was that he might elect

such a board of directors as the bondholders and creditors would have confidence in, and that they might not be turned out at the next election; that he had nothing to do with getting the stock. It was done by some of the old directors. It was thought that some arrangement could be made with the bondholders and creditors and something saved for the stockholders in the adjustment. If I could obtain stock in any adjustment I was to return half to them, the other half to go on the iron debt. If nothing
45 & 46 should be accomplished the whole should be returned to them. Receipts were required of me for the different persons who transferred stock. Geo. Green's receipt was dated February 10, 1875. It was soon ascertained that the overissue of bonds was so great and the debt so large that it was useless to go on. Application had to be made for a receiver and foreclosure proceedings commenced. When a reorganization was made, or before, I learned from many of the bondholders that their dissatisfaction was such that they would not recognize or allow anything for the stock. This I made known to many inquirers and felt it my duty to return the stock to the original owners and let them seek redress, if they had any. On the 24th of May, 1877, I transferred all the stock in my hands to S. P. Wisner, Esquire, of Cedar Rapids, as trustee, to transfer back to every person every share of stock that was transferred to me and get up my receipts. On July 5th Wisner wrote me he had transferred to Geo. Greene the shares that I got from him and returned to me the receipts that I had given. It was stated to me when the stock was passed to me that it was full-paid stock, but it was considered of no value, except to control the management of the road, unless the bondholders' new organization would allow something. Judge Greene told me shortly after July 5th, 1877, that he had received his stock which I had returned.

(Said witness produced the following, which is a copy of the receipts given:)

"BURLINGTON, CEDAR RAPIDS & MINNESOTA RAILWAY,
"CEDAR RAPIDS, *February 10th*, 1875.

47 "This may certify that I have purchased of Geo. Greene eleven thousand two hundred shares of the Burlington, Cedar Rapids & Minnesota Railway Company's stock, and I do hereby agree to sell him, for the consideration of one dollar, five thousand six hundred shares of Burlington, Cedar Rapids & Minnesota Railway Company's stock at any time after the 10th day of February, 1878, provided that if any reduction in the shares of stock so purchased of him is made in the reorganization of the company, then I am to sell him the one-half of the amount that is left after said reduction is made; and the said Blair is authorized to make or agree to any reduction of the total amount of stock now issued by the company or to be issued under any reorganization without any liability to said Greene of any kind whatever, except to sell one-half as above, that Blair may get under any reorganization or reduction.

"(Signed) J. I. BLAIR."

The foregoing was all the evidence introduced by the parties on the trial of this cause.

Be it further remembered that after the introduction of said evidence and at the proper time during the trial the plaintiff separately requested the court to give to the jury each of the following instructions, numbered, respectively, one, two, three, four, five, six, & seven, each and every of which the court separately refused to give, and to each such separate refusal of the court the plaintiff at the time noted a separate and distinct exception as to each of
48 the instructions so asked, to wit: To the refusal of the court to give number one the plaintiff at the time duly excepted; and to the refusal to give number two the plaintiff duly excepted; and to the refusal to give number three the plaintiff excepted; and to the refusal of the court to give instruction number four as asked the plaintiff excepted; and to the refusal of the court to give instruction five as asked the plaintiff excepted; and to the refusal of the court to give instruction number six as asked the plaintiff duly excepted; and to the refusal of the court to give instruction number seven as asked the plaintiff duly excepted; which said instructions are in the words and figures following, to wit:

NEWELL D. CLARK
vs.
JAMES L. BEVER, Administrator *de bonis non* of the Estate of Geo. Greene, Deceased.

Instructions for Plaintiff.

If you find from the evidence that the intestate, Geo. Greene, was the owner of 910 shares of the stock of the Burlington, Cedar Rapids & Minnesota Railway Co., and that only twenty cents on the dollar was paid thereon and taken by him with full knowledge of the fact, and that he was the owner of said shares at the time the debt was contracted upon which plaintiff recovered his judgment, then he would be liable for the unpaid part of said stock to the plaintiff.

2.

48½ If you find from the evidence that on the 28th day of March, 1872, the Burlington, Cedar Rapids & Minnesota Railway Company was indebted to the construction company in the sum of $70,000 in cash; that the decedent, George Greene, was a member of both companies, and that said railway company not being able to pay the money at the time it was agreed that instead of the payment in cash of said sum that the railway company should issue to said construction company $350,000 of its capital stock, and that thereupon there was issued to said George Greene, as a member of said construction company, and he received $91,000 of said stock, and that no other payment except the said 20 per cent. thereon was ever made, then said Greene would be liable to the plaintiff for the unpaid 80 per cent. if the debt of the plaintiff was created while

said Greene was a holder of said stock, and if you so find, then the plaintiff is entitled to recover.

3.

The fact (if it was the case) that at the time said stock was so issued it had no market value would not in any manner relieve said Greene from his liability on account thereof.

4.

If the said railway company after the issue of said stock continued to transact business and to create indebtedness and, in fact, afterward issued the bonds upon which this suit is brought, then such acts were a representation that it was a solvent and going concern, and it and its stockholders would be estopped from claiming any exemption by reason of the fact that said company may
49 have been insolvent in legal contemplation at the time said stock was issued.

5.

If the jury are satisfied from the evidence that Geo. Greene, the intestate, took from the B., C. R. & M. R. W. Co. 910 shares of stock upon which only twenty per cent. was paid, then the law makes his administrator liable to creditors of the corporation who have obtained judgment and had executions returned without finding property for the unpaid eighty per cent. of such stock, if so much is necessary for the purpose of paying such debts.

6.

5th. An agreement between the intestate and the B., C. R. & M. R. W. Co. that the stock should be issued at twenty per cent. would not bind the plaintiff, and as to him the defendant would be liable for the par value of the stock or any unpaid portion thereof.

7.

The defendant, upon the evidence introduced and the conceded facts, is liable, and this plaintiff is entitled to recover, and you will find for him in the amount of the unpaid stock owned by decedent, Geo. Greene, which is shown to be 80 per cent. on $91,000.

And the said exceptions of the plaintiff to the refusal of the court to give each of said instructions were duly noted at the time and allowed, and said instructions and exceptions are hereby made part of the record. Thereupon the court held as matter of law that the plaintiff's right of action was not barred by any statute of limitations pleaded by the defendant; but the court
50 further held as matter of law that upon the evidence set out in the record and the facts proved thereby that the said George Greene, deceased, by the taking of the 910 shares of stock of the Burlington, Cedar Rapids & Minnesota Railway Company upon which twenty per cent. only was paid, as shown by the evidence, did not become liable to pay anything further on account

thereof to creditors of the corporation, and thereupon instructed the jury that the defendant was not liable to plaintiff by reason thereof or by reason of the facts proved by plaintiff, and that they should find and return a verdict for the defendant; to which last holding and instruction, that the defendant was not liable, and that by the taking of the stock by said George Greene and the facts and circumstances connected therewith, as shown by the evidence, that said Greene did not become liable for the unpaid 80 per cent., the plaintiff at the time duly excepted, and his exceptions were noted and allowed; and to the giving of said instructions to the jury to find for defendant the plaintiff at the time duly excepted, and his exception was noted and allowed, and his exceptions are hereby made a part of the record; to the said holding of the court as matter of law that upon the evidence that plaintiff's right of action was not barred by the statute of limitations the defendant at the time excepted. All of the said exceptions were at the time noted and allowed and are made part of the record. The jury thereupon returned a verdict for the defendant. Thereupon the plaintiff prays that this his bill of exceptions be allowed and certified and
51 made part of the record, which is done, and said evidence, instructions, and all exceptions are hereby made part of the record.

(Signed) J. M. LOVE, *Judge.*

Endorsed: Filed July 13, 1887. H. K. Love, clerk.

52 The following is a copy of the opinion filed herein in this cause, and which reads in words and figures as follows, to wit:

Circuit Court United States, Southern District of Iowa. June T., 1887.

NEWELL D. CLARK
vs.
J. L. BEVER, Administrator George Greene, Deceased.

This is an action at law to recover from the personal representatives of George Greene eighty per cent. unpaid upon 910 shares of stock issued to him by the Burlington, Cedar Rapids and Minnesota Railway Company.

The amount claimed is the sum of $65,523.20, with interest.

It seems that George Greene was a stockholder of said company and also a member of a construction company by which the work of building had been done.

The railway company was indebted to the construction company in the sum of $70,000 without any means of making payment of the same. The railway company was, in fact, insolvent. Its earnings were insufficient to pay the interest on its large bonded debt. It had a floating debt of over a half million of dollars which it could not provide for. It is sufficiently evident that the whole corporate property was insufficient to pay the bonded debt secured upon the property, and that the stock of the company had no market value. Under these circumstances the railway company entered into an

53 arrangement with George Greene and his associates by which the company issued to them its stock at the rate of twenty cents on the dollar in full payment and discharge of the debt of $70,000 which they held against the company. The stock was to be received as full paid. The shares of stock were $100 each, and George Greene received his proportion, amounting to 910 shares. It is to recover the unpaid 80 dollars on each of these shares of stock to be applied on the plaintiff's judgment that the plaintiff, a creditor of the company, brings this action. It appears that George Greene and his associates received the stock reluctantly and with the hope, by its means, of raising the company from its crippled condition of insolvency. With this view they transferred the stock for a nominal consideration to Jno. I. Blair, a large capitalist, by whom it was retransferred to his assigners upon finding that the task of getting the R. R. company out of its difficulties was hopeless.

The plaintiff, having recovered a judgment in a State court of Iowa against the railway company and having caused execution to issue upon the same, which was returned *nulla bona*, now prosecutes this suit for the purpose stated. A jury was called *pro forma*, but the case was tried practically before the court upon facts not disputed by the parties and upon pure questions of law. The jury were directed by the court to enter a verdict for the defendant upon the admitted facts.

P. Henry Smythe & Joseph G. Anderson, for the plaintiff; Charles A. Clark, for the defend.

54 *Opinion.*

By LOVE, *Judge:*

Whoever, in my opinion, takes the stock of a solvent corporation must receive it *cum onery*. He proposes to become a member of the corporation and to participate in its rights, profits, and benefits on equal terms with other stockholders in proportion to his stock, and he cannot take these advantages without assuming the burdens of the corporation in like proportion to the amount of his stock. This may not be true; indeed, I think it is not true of the case of an insolvent corporation which is in the course of settlement or liquidation.

I cannot see that the creditors of a solvent corporation, the assets of which are entirely adequate to the satisfaction of their claims, have any interest in compelling a particular stockholder to pay up his stock in full; but it is surely otherwise, as I will presently show, with the full-paying stockholders themselves.

These principles may be best illustrated by considering the relations which the taking of stock creates.

The stockholder assumes a threefold relation: 1st, to the corporation itself; 2nd, to the creditors of the company; 3rd, to the other stockholders.

To the creditors he becomes a debtor to the amount of his unpaid stock when the company becomes insolvent and fails to pay its debts.

To other stockholders he assumes the relation of a *quasi* partner,
in that he participates in the profits and advantages of the
55 corporation and takes its burdens to the extent of his unpaid
stock. To the corporation itself he is bound by the contract by which he owns the stock which has been issued to him. He is a debtor to the corporation to the amount of his unpaid stock.

What is the nature of the contract which the taking of stock in a corporation creates? What relations does it establish between the shareholders and the other stockholders and also to the creditors and the corporation? The taking and receiving of stock is a contract founded upon certain considerations to the stockholder.

It is not a gift to him. By taking of the stock he becomes a member of the body corporate. He has a right to vote upon his stock. He entitles himself to his share of the profits, if any, and to the property of the corporation upon the final distribution in proportion to his holding of stock. Such are the considerations flowing to the stockholder. And what are his undertakings in consideration of the rights and interests thus secured? His undertaking is to pay for the stock. Can a stockholder, by agreement with the corporation issuing the stock, lawfully stipulate that he shall pay less than the face value of the same, say ten or twenty cents on the dollar?

It is manifest that the law will not permit any party to make a contract which necessarily works a fraud upon the rights of other parties.

Now, if all the subscribers and takers of stock should be allowed
by contracts with the company to pay less than the face
56 value of the stock a fraud upon the creditors, in case of insolvency, would be the unavoidable result. Creditors in dealing with the corporation look to its means of payment, which is in part its capital stock and its earnings. The stockholders are members of the corporation. They authorize the corporation, which is organized for their benefit and profit, to hold them forth to the world as contributors to the respective amounts of their stock to the assets and capital of the corporation. They thus give the corporation credit. They also take its earnings in proportion to their shares in the form of dividends. They receive these dividends in proportion to the full amount of their shares, and not upon any reduced basis founded upon their contract to pay into the corporation less than the face value.

These earnings and dividends, if not received by the shareholders, could be applied to the satisfaction of the claims of creditors. To permit stockholders to pay ten or twenty per cent. on their stock and receive dividends upon it at the rate of 100 per cent. would work manifest injustice to creditors. To permit the stockholders and the corporation to hold the stockholders out to the world as responsible for one hundred dollars upon each share of stock, and by a private agreement between the corporation and the stockholders to allow the latter to pay only ten or twenty dollars on each share, would work a manifest fraud upon the creditors of the corporation.

Hence the law would not permit such a contract between the company and the shareholders.

57 It is equally clear that it would work wrong and injury *pro tanto* to creditors, in case of insolvency, to permit one stockholder to receive dividends upon full stock and pay only a small per cent. upon it into the treasury of the company. If there is anything fundamental respecting both corporations and private partnerships it is that creditors have a right to satisfaction before any member of the firm or corporation is entitled to appropriate the earnings or profits.

But supposing that creditors should have no right to complain, assuming that the assets of the corporations should be sufficient to pay all debts, we must still consider the relation — stockholders to one another and the results that would flow from a rule permitting the corporation to issue stock to particular persons at less than the face of the stock. Of course, the original subscribers of stock and all others not exempt by contract with the corporation from full payment would be compelled to pay dollar for dollar of their stock, for such would be the contract involved in their subscription to the capital stock. This might result in the grossest inequality and injustice between different classes of stockholders. While one class would be required to pay only, perhaps, ten or twenty cents on the dollar and another dollar for dollar, all would participate equally in the profits and dividends and in the final distribution of the corporate property. In case of insolvency one set of stockholders might be compelled to pay in for the benefit of creditors one hundred cents on the dollar and another favored class only,

58 perhaps, ten or twenty cents on the dollar. I am not, therefore, able to see how a solvent corporation could, without consent of the stockholders, lawfully issue stock to other parties exonerated from the payment of its full face value. The president and directors are but trustees for the creditors and stockholders, and as such they must, in the absence of express law, do what justice and equity require, and equity certainly requires equality of both benefits and burdens among stockholders.

But the question before the court in the present case is whether or not the principle in question is of universal application. Does the doctrine that the president and directors of a corporation cannot lawfully issue stock exonerated from full payment apply to all possible cases? Does it apply at all to a corporation in a state of insolvency using its stock without other means of payment to satisfy and discharge the debt of a particular creditor? The supreme court of Iowa have, in a majority opinion in the case of Jackson *vs.* Traer, as I understand their judgment, laid down the broad and sweeping doctrine that it is also entirely illegal for the president and directors of a corporation to issue stock to any party with a stipulation exempting the stockholder from full payment of the stock, so far as creditors are concerned. Such a stipulation is simply void. The stockholder is bound to pay up the full face value of the stock, notwithstanding the agreement of the corporation with him to the contrary.

59 The general principles laid down and strongly enforced in the majority opinion stand no doubt upon impregnable ground. They are stated with marked ability and fullness in that opinion; but I incline to think that the majority were in error in applying the principle to the case then before them, which, indeed, was the very case now before this court. I am of opinion that there may be some exceptions in the application of that principle, just and most salutary as it undoubtedly is, and that the case before us is one of those exceptions. What are the grounds and reasons of the doctrine that a stockholder cannot by contract with the corporation be exempt from the full payment of his stock? The sole reason and basis of the principle is that the capital stock, in common with the other property of a corporation, is a trust fund primarily for the satisfaction of its debts and subject to the rights of creditors for the benefit of the shareholders. Now, suppose it could be shown in any given case that an issue of stock by the company, with the right to the stockholder of partial payment, would prove a benefit rather than injury to both creditors and shareholders, what reason would there be to apply the principle in question to such a case? Of course, the burden of showing the beneficial character of such a transaction to creditors and shareholders would rest upon the holder of stock. Suppose a creditor of an insolvent corporation should see fit, for any reason satisfactory to himself, to receive the worthless stock of the corporation as paid-up stock at twenty cents on
60 the dollar in full satisfaction of his debt, what possible injury could accrue to other creditors and stockholders? Would such a transaction not prove an absolute benefit to them?

In the first place, such stock in the possession of the company unissued would be of no value whatever to creditors. It would produce nothing and pay nothing. It would seem, therefore, that the payment of a debt by the issue of such worthless stock would be no possible injury to other creditors. On the contrary, it would seem to be a positive advantage to the other creditors to have a particular debt discharged by stock of no value, because the creditor so receiving the stock would have no right to claim *pro rata* payment out of the assets of the insolvent corporation. As to the stockholders of the corporation, how would they be injured by such a transaction? The corporation being insolvent and its assets, including, of course, the capital stock fully paid up, being insufficient to pay the debts, there would be nothing left for the stockholders. Their stock would be worthless. It could not be made less valuable by the payment of a particular debt with newly issued stock. They would not be affected one way or the other by the transaction, since they would be compelled to pay their stock up fully for the benefit of the creditors, and nothing more could in any event be required of them. The very case before the court presents an example illustrative of what I have just said. The railway Co. was insolvent; its stock, issued and unissued, was worthless; but George Greene
61 and his associates, for reasons peculiar to themselves, reasons which would have influenced the conduct of no one else, accepted the unissued stock of the Co. at 20 cents on the dollar in pay-

ment of a debt of 70,000 dollars. If there was anything left in the corporation to be paid *pro rata* on its debts the transaction was a positive benefit to the creditors holding such debts. It is safe to say that if Greene and his associates had known or believed the law to be such as to require them to pay 80 cents on the dollar upon the stock which they received they never would have taken it; it would have remained unissued, without value to creditors, in the possession of the corporation, and the debt of $70,000 would have remained to be paid *pro rata* with other debts, and as to the other stockholders of the insolvent corporation I do not see how they could have been affected one way or the other by the transaction.

It seems to be a fair inference from the facts that George Greene, who was a member of both corporations, entertained a hope that by taking the stock in question and transferring it to Jno. I. Blair the corporation could be restored to solvency and placed once more upon its feet. In this he failed, and the stock was returned to him by Jno. I. Blair; but if Greene had succeeded in this the result would have proved highly beneficial to both the creditors and stockholders of the corporation.

As, however, Greene failed in accomplishing his purpose, the stock which he received must have proved worthless in his hands, while the debt of $70,000 was wiped out.

It is argued against this view that the debt upon which
62 the present suit is founded was contracted subsequent to the transaction between Greene and the corporation, and that the reasoning of the court cannot be sound when applied to the claim of the plaintiff in this case.

This argument has been urged with singular plausibility and force, but I cannot regard it as conclusive.

If the transaction between George Greene and the corporation was at the time beneficial to the creditors then existing, and if it was therefore legitimate, I am not able to see how it could be rendered invalid by debts subsequently contracted. The issue of the stock to George Greene and his associates was not a secret transaction. It was open and public. The resolution authorizing it was spread upon the records of the corporation. The new creditor taking the company's bonds, if he opened his eyes, must have seen that the stock issued to George Greene was delivered to him as paid-up stock. If the new creditor looked beyond the surface of the transaction we are bound, in our view, to hold that he discovered that the transaction was entered into in good faith; that it was beneficial to then existing creditors of the insolvent corporation, and that it was therefore legitimate and unimpeachable. We must assume that the new creditor took the obligations of the corporation with notice and full view of these facts.

Again, it is urged that the Iowa statute law positively prohibited
the transaction in question, so far as it was attempted to
63 exempt the stock from full payment; but we answer that the statute must receive a reasonable construction; that its sole purpose was the protection of corporate creditors; that in the present case it would have worked positive injury to the creditors

of the insolvent corporation to have given the Iowa statute the strict and rigid construction now claimed for it. Such a construction applied to the case in question would have defeated the very purpose and policy of the statute, and that such could not therefore have been the intention of the Legislature in passing the law.

Afterwards, to wit, at the June term, 1887, of said court and on the 29th day of July, A. D. 1887, a record entry was made in this cause, which reads in words and figures following, to wit:

NEWELL D. CLARK
vs.
JAMES L. BEVER, Adm'r of the Estate of George Greene, Deceased.

Now, on this day, this cause coming on to be further heard, the plaintiff appearing by P. Henry Smythe and Son and Anderson, Davis & Hagerman, his attorneys, and the defendant appearing by Charles A. Clark, his attorney, and the court being advised in the premises, and a verdict of the jury for the defendant having been heretofore found and returned—

It is therefore considered by the court that the plaintiff's
64 action be dismissed upon the merits, and that the defendant go hence without day, and that the defendant do have and recover of and from the plaintiff the costs of this action, to be taxed by the clerk, and that execution issue therefor; to which action of the court in dismissing the plaintiff's action the plaintiff at the time excepted, and to which action of the court in rendering judgment against the plaintiff for costs the plaintiff at the time excepted; and thereupon the plaintiff asked that a writ of error issue, which request was granted, and the plaintiff also requested the court to fix the amount of bond to operate as a supersedeas; and thereupon the court fixed the amount of such bond at two thousand dollars.

65 *Bond.*

Know all men by these presents that we, Newell D. Clark, Robert Donahue, and R. Spencer, are held and firmly bound unto James L. Bever, as administrator of the estate of George Greene, deceased, in the full and just sum of two thousand dollars, to be paid to the said James L. Bever, administrator as aforesaid, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at the June term of the circuit court of the United States for the southern district of Iowa, eastern division, holden at Keokuk, in a suit depending in said court between Newell D. Clark, plaintiff, and James L. Bever, as administrator of the estate of George Greene, deceased, defendant, judgment was rendered against the said Newell D. Clark, plaintiff, and the said Newell D. Clark

having obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James L. Bever, administrator as aforesaid, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

66 Now, the condition of the above obligation is such that if the said Newell D. Clark shall prosecute said writ of error to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) N. D. CLARK.
ROB'T DONAHUE.
R. SPENCER.

STATE OF IOWA, }
Des Moines County, } *ss:*

I, W. D. Inghram, clerk of the district court within and for said county and State, hereby certify that the sureties on the attached bond are amply sufficient for the penalty of the same, and that if said bond was presented to me for approval I would unhesitatingly approve it.

[SEAL.] Witness my hand and the seal of said court, affixed at Burlington, this fifth day of August, A. D. 1887.

(Signed) W. D. INGHRAM, *Clerk.*

Approved by me August 6th, 1887.

H. K. LOVE, *Clerk,*
By ERIE J. LEECH, *Deputy.*

Approved by—
J. M. LOVE, *Judge.*

Endorsed: Filed Aug. 6, 1887. H. K. Love, clerk.

67 In the Circuit Court of the United States for the Southern District of Iowa, Eastern Division.

THE UNITED STATES OF AMERICA, }
Southern District of Iowa, Eastern Division, } *ss:*

I, H. K. Love, clerk of the circuit court of the United States for the eastern division of the southern district of Iowa, do hereby certify that the foregoing transcript contains a true, full, and complete copy of the record and testimony as set out in the bill of exceptions, &c., in a certain cause heretofore pending in said court, wherein Newell D. Clark is plaintiff and James L. Bever, administrator of the estate of George Greene, deceased, is defendant, as full, true, and complete

as the original of the same now remain on file and of record in my office.

Seal of the Circuit Court of the U. S., Southern Dist. of Iowa.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office, in Keokuk, in said divison of said district, this 31st day of August, A. D. 1887.

H. K. LOVE, *Clerk C. C. U. S.*,
By ERIE J. LEECH, *Deputy.*

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States to James L. Bever, as administrator of the estate and effects of George Greene:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the southern district of Iowa, eastern division, wherein Newell D. Clark is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the U. S., at Keokuk, in said district, this 29th day of July, 1887.

J. M. LOVE, *Judge.*

Service of foregoing citation and receipt of copy of the same acknowledged, at Cedar Rapids, Iowa, on the 18th day of August, A. D. 1887.

CHAS. A. CLARK,
Att'y for Def't in Error.

[Endorsed:] Newell D. Clark *vs.* Jas. L. Bever, administrator, &c. Citation. Original. Filed August 25, 1887. H. K. Love, clerk.

69 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the southern district of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Newell D. Clark, as plaintiff, and James L. Bever, as administrator of the estate and effects of George Greene, deceased, as defendant, a manifest error hath happened, to the great damage of the said Newell D. Clark, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid

in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 29th day of July, A. D. 1887.

[Seal of the Circuit Court of the U. S., Southern Dist. of Iowa.]

H. K. LOVE,
Clerk U. S. C. C., Southern District of Iowa,
By ERIE J. LEECH, *Deputy.*

Allowed.
J. M. LOVE, *Judge.*

[Endorsed:] Clark *vs.* Greene. Original. Filed July 29, 1887. H. K. Love, clerk, by Erie J. Leech, deputy.

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the southern district of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Newell D. Clark, as plaintiff, and James L. Bever, as administrator of the estate and effects of George Greene, deceased, as defendant, a manifest error hath happened, to the great damage of the said Newell D. Clark, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 29th day of July, A. D. 1887.

H. K. LOVE,
Clerk U. S. C. C., Southern District of Iowa.

Allowed.
J. M. LOVE, *Judge.*

Service of copy of writ of error in above-entitled cause and receipt of "copy for defendant in error" acknowledged, at Cedar Rapids, Iowa, August 18th, 1887.

CHAS. A. CLARK,
Att'y for Def't in Error.

[Endorsed:] Newell D. Clark *vs.* Jas. L. Bever, administrator. Copy of writ of error. Original. Filed Aug. 25, 1887. H. K. Love, clerk.

Endorsed on cover: S. Iowa C. C. U. S. No. 116. Newell D. Clark, plaintiff in error, *vs.* James L. Bever, administrator of the estate and effects of George Greene, deceased. Filed September 26, 1887.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

NEWELL D. CLARK, *Plaintiff in Error,*
vs.
JAS. L. BEVER, Administrator of the Estate of George Garen, Deceased, *Defendant in Error.* } No. 113.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

P. Henry Smith, for Plaintiff in Error.

PETITION AND MOTION FOR A RE-ARGUMENT,

AND

BRIEF IN SUPPORT THEREOF.

Argus, Printing & Co., Printers, Washington.

Service of copy of writ of error in above-entitled cause and receipt of "copy for defendant in error" acknowledged, at Cedar Rapids, Iowa, August 18th, 1887.

CHAS. A. CLARK,
Att'y for Def't in Error.

[Endorsed:] Newell D. Clark *vs.* Jas. L. Bever, administrator. Copy of writ of error. Original. Filed Aug. 25, 1887. H. K. Love, clerk.

Endorsed on cover: S. Iowa C. C. U. S. No. 146. Newell D. Clark, plaintiff in error, *vs.* James L. Bever, administrator of the estate and effects of George Greene, deceased. Filed September 26, 1887.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

NEWELL D. CLARK, *Plaintiff in Error*,
vs.
JAS. L. BEVER, ADMINISTRATOR OF THE ESTATE OF GEORGE GREEN, Deceased, *Defendant in Error*. } No. 116.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

P. HENRY SMYTH, for Plaintiff in Error.

PETITION AND MOTION FOR A RE-ARGUMENT,

AND

BRIEF IN SUPPORT THEREOF.

ACRES, BLACKMAR & CO., Printers, Burlington.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

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Comes now the plaintiff in error by P. Henry Smyth, his attorney, and moves the court to set aside the decision and opinion heretofore rendered and filed and for leave to reargue and submit the cause, and in support of said motion assigns the following reasons:

I.

The decision rendered herein seems to be (and I think upon further investigation, will be found to be) in conflict with the established rules of law on the subject of the liability of stockholders; and that the court has misapprehended the effect of the cases cited in support of the ruling, and especially the case in 11 Wallace and that in 19th Iowa.

II.

The case at bar contains an element, which even under the rule announced, would take it out of that rule and place it under the general rule established by the decisions of nearly all the courts, to-wit: That the fact that plaintiff in error had no knowledge of the insolvency of the company, and the worthlessness of the stock, and became a creditor long after the transaction, that his rights could not be affected by these circumstances—and in the language of a refused instruction, set out on page 31 of original brief, defendant would be estopped from setting up the same, as follows:

> If the railway company, after the issue of the stock, continued to transact business and create indebtedness, and in fact issued the bonds upon which suit is brought, then such acts were a representation that it was a solvent and going concern, and it and its stockholders would be estopped from claiming any exemption by reason of the fact that said company may have been insolvent in legal contemplation at the time when the stock was issued.

BRIEF AND ARGUMENT.

I submit, with all due respect, that it is impossible upon a full and careful reading of the opinion handed down by the court in this case, to escape the conclusion, that the direct and logical result and effect of it is, to overrule and abrogate the prior decisions of this court, on the subject, as well as the almost uniform current of authority on the question of liability passed upon.

Those decisions, as they stood up to now, left us with a fairly well defined rule, but that rule has been greatly misunderstood, or else the dicision in this case, it seems to me, has so modified and changed it, that it can no longer be called a rule.

Begging the indulgence of the court, I will refer in as concise a manner as possible to the material points in which it seems to me the court has adopted a misconception of the case and the governing rule.

On page 5 of the printed opinion the court uses this language:

> "Under this view (that insisted on by plaintiff in error) everyone having "claims against a railway company—even laborers and employees—who could "get nothing in payment except stock, became bound by accepting stock, to "account to unsatisfied judgment creditors, &c."

If the rules I contend for exist, how could these circumstances change them? If we could imagine a case, where laborers and employees would be willing to accept stock in an insolvent corporation, how is it possible for us to disassociate that act, with a well founded hope on their part, that the corporation, although seeming to be

dead, was only in fact sleeping. What earthly inducement could exist for taking stock in a defunct corporation? And if a creditor of any kind were so foolish as to be willing so to do, how could his condition be bettered by taking that stock at less than par? If his debt were one hundred dollars ($100.00), why should he say, I will take five hundred dollars ($500.00) in stock unless two things existed—1st, that he believed the corporation was not insolvent, and that when it recovered, he would have the advantage of five to one over those stockholders who had paid par for their stock, and therefore "reap where he had not sown"; and if actuated by such motives he should prefer to take more stock than his debt paid for, why should he not take the corresponding risk of being called on by creditors to pay in full that sum which his stock represented him to be liable for? And in taking the stock under the supposed circumstances, how much more meritorious would his case be than that of many of those in the cases cited in the opinion, in this and other courts, where they were held to a strict accountability, although no design to defraud creditors or others was shown. Many of the cases were of extreme hardship; some of the stockholders had taken the stock as collateral, and not only lost the debt, which it was intended to secure, but had to pay as much more, simply because the rule required payment in full at the instance of creditors.

Again, on this same page 5, the question of the *power* to dispose of stock at less than par is discussed under the provisions of the Iowa statute, and a quotation is made by the learned justice, from that statute, thus:

"To make contracts, acquire and transfer property, possessing the same "power in such respects as private individuals now enjoy, &c."

Arguing from this provision it is assumed that the corporation possessed the power to dispose of its capital stock at less than par. But we beg to call the attention of the court to the fact that if this be correct then the corporation is invested with rights, and powers far above and beyond those possessed or enjoyed by individuals, for there has never yet been any device discovered by the ingenuity of man, in a civilized country, where individuals or private persons, whether single persons doing business on their own account, or company's, or partnerships, have ever been able to escape being held by the courts to a full liability for every debt by them contracted. So that private persons enjoy no such immunity as is claimed for the defendant in this case. That corporations created by law are endowed with peculiar powers and rights not possessed by individuals, is incontrovertable, not the least important of which is the right to limit the liability of their members. But to this is attached that just and necessary provision, that for this immunity the capital stock shall take the place of and stand for the personal liability, which, in like cases, would attach to individuals; and also as a qualification of this important right, is the doctrine of *ultra vires*, which is almost unknown in dealings between individuals or private persons. And I think it may be deemed fundamental, that this right of exemption from liability for debts, beyond the amount of stock taken, is subject to the condition that the corporation has no power to dispose of its capital except for money or money's worth; otherwise, as has been so

often and so well said by this and so many other courts, the capital stock becomes "a delusion and a snare." That the legislature of Iowa intended to make it *ultra vires* in every corporation organized under its authority, to allow the capital to be taken without full payment, is certainly shown by section 1082 of the Code (p. 6 brief of plaintiff in error). This is the construction which the Supreme Court of Iowa has always put upon it, not only in Jackson *vs.* Traer, 64 Iowa, 483, but in every other case upon which they have passed, involving the question; and I will show your Honors further on, by full quotations from the opinion, that the rights of creditors were not in any manner involved in the case cited by the court from the 19th Iowa.

The statute referred to is most comprehensive, and by its language covers all questions which could arise, as to distinction between *subscribers* to stock and the *takers and holders* of stock. Its language is:

> "Neither any thing in this chapter contained, nor any provision in the "articles of incorporation shall exempt the *stockholders* from individual "liability to the amount of the unpaid installments on the stock *owned by* "*them.*"

This evidently meant that any person who was a holder or owner of stock should be liable for any unpaid part of the same. If it had been contemplated that the corporation should possess the power to say, that persons who held stock but paid nothing for it, were by an agreement with it allowed to be exempt from such payment, this language would not have been used; and yet if the doctrine accepted by the court in the opinion be correct, why could not the corporation put out all its stock for a nominal consideration, while there were yet

no creditors, and while under the law it posted them as holders of full paid stock, and yet say, when they were sued, "this was best for all concerned, when we made the "arrangement; we owed nothing at the time, and nobody "was injured. The people at large had no faith in our "enterprise, they would not subscribe for our capital, we "could not sell it at any price; it was deemed best to en- "list, say Mr. Blair, a man of wealth and influence, or "Judge Green, a man of enterprise, and so it was deemed "both wise and prudent to give him so many shares for the "use of his name or his influence;" "or we had borrowed "of him one thousand dollars ($1,000) and thought best "for all to give him ten thousand dollars ($10,000) of "stock; we did not mean to cheat anybody, we had no "creditors, and if we had, we thereby reduced our liabili- "ties to the extent of one thousand dollars ($1,000), and "left so much more for others." True, it would appear to outsiders that ten thousand dollars ($10,000) of full paid stock was held by the favored person, but as it was so agreed between him and the corporation, they could not complain, although they might deal with the company under the belief that the stock had been paid for and under the construction given the law by the courts, that it must have been paid for, or at the instance of creditors, it would have to be. We call attention of the court particularly to the fact that the statute uses the words *stockholders* and owners of *stock*, treating it as immaterial how this holding or ownership came about, whether by subscription or otherwise.

I refer to this because the court in the course of its opinion uses language which seems to mean that there

is a difference in the legal obligation of a subscriber and one who takes stock without a subscription. A moments consideration will show that it was intended by the statute that no such difference should exist, and upon principle independent of the statute, none can exist. A subscription is only a written agreement to take stock, and is in effect as much a sale of the stock by the company as if it were taken without subscription. When by a subscription a man agrees to take and pay for so many shares, the company also agrees to sell him the same shares, and it would be just as legal for the company to agree that the payment of twenty (20) per cent on the subscription should entitle the subscriber to full paid shares, as if the whole transaction were oral, and the stockholder had said, I will pay you two thousand dollars ($2,000) if you will issue me ten thousand dollars (10,000) of paid up stock, and thereupon it was so done.

Indeed the decisions are uniform in holding that the obligations of the taker of unpaid stock are the same as a subscriber.

This court so held in Upton *vs.* Trieblecock, 91 U. S., 47, and in so holding said it was hardly *necessary to argue the proposition.*

"If the defendant became holder of shares and had only paid twenty per "cent. creditors were entitled to require the other eighty.

"The acceptance and holding of the certificate makes the holder liable to "the responsibilities of a share holder. A promise to take shares imports a "promise to pay for them; the same effect results from an acceptance and hold- "ing of a certificate."

In this case there did not appear to be any design to defraud any one; there is nothing to show that the stock was worth any more than the defendant had

promised to pay, to-wit: Twenty per cent. There were no creditors, the company had two thousand dollars ($2,000) more than it would have had, and the other creditors were that much better off.

This case has another important feature, to which I direct the attention of the court (see page 49); The defense relied upon was as to the *legal* effect of defendants subscription and certificate; good lawyers had said he could take paid-up stock at twenty per cent., and that the amount would be legal.

The defendant made the subscriptions and received the certificate he intended to and had stipulated for, but in law the defendant incurred a larger liability than he anticipated.

Every thing was done in as good faith as in the case at bar, and the language of the court in the opinion that "Green would not have taken the shares, if he had sup- "posed he would be liable for the unpaid eighty per "cent." would have been as appropriate and forcible in the case cited as in this. But it was a mistake of law, and not of fact, and the effect of such mistake is fully discussed in the case we are considering, pages 50-51.

I am citing anew these cases in order to have the court reconsider the proposition implied in this language on page 9 of the opinion:

"In all the cases except one there was an actual subscription of a given "amount, cases of promises to pay the company the amount, *not of sales* "*by it.*"

These authorities are uniform in holding that this makes no difference, and it has been so held in not only one but many cases. A case directly in point in this court, but not cited in the opinion, is Hawley *vs.* Upton,

102 U. S. 314. There was no subscription but a direct out and out sale of ten shares of the stock of the corporation for two hundred dollars ($200), the only difference between that case and the case at bar being that Green paid the consideration in an old debt, and the defendant in the case cited gave an agreement to pay the same in installments in the future, but it was as much a sale in one case as in the other. In that case this court used this language, spoken by Chief Justice Waite, page 316:

> "As the company could not sell its stock at less than par, what was done "amounted in law to a subscription for the stock and nothing else."

This was a case from Iowa, and directly sustains the view of the Iowa courts, that when stock of a corporation is taken it must be taken at par; so far as creditors are concerned, and why not? In the case at bar Green had paid for eighteen thousand dollars ($18,000) of stock; why was he not content to take so much paid up? Why did the construction company want three hundred and fifty thousand dollars ($350,000) of stock for only seventy thousand dollars ($70,000) of debt, and on the face of things a dubious claim at that? Because of the hope that the company would pull through and they thereby gain a great advantage.

No stress was laid in the original arguments upon the circumstances under which Green had taken the stock being a member of both corporations and the author of the scheme, because, all of the authorities, with a united voice, held that to take and hold stock at less than par was a fraud in law, and therefore fraud in fact, was immaterial.

Now in the case last cited, we find this court in harmony with the Iowa courts holding that it is *ultra vires* for a corporation to sell its stock at less than par; such in fact seems to be the result of all the decisions of this court, as is said in the opinion, page 9.

"In Scoville *vs.* Thayer it was declared, among other things, that a con-
"tract between a corporation and its stockholders that they should never be
"called on to pay any other assessment, &c., while good between the stock-
"holders and the corporation, *was a fraud in law upon creditors.*"

There was no intimation in this case that this principle depended in any manner upon the question as to whether the stockholder had *subscribed* for or *purchased* his stock of the company without subscribing; in fact, we think the case shows that Thayer was not a subcriber, but only a holder of shares (page 144.)

The court says, page 153: "The stock held by defend-
"ant was evidenced by certificates of full paid shares."
This case also holds that a creditor has a right to presume that the stock has been or will be paid-up, and in effect logically holds that it is *ultra vires* for the company to sell its stock for less than par, holding directly in line with all the Iowa cases.

The truth is that this court had so firmly established the doctrine, and so well defined the rule we are contending for, that it had without statutory enactments come to be the settled doctrine of all, or nearly all, of the inferior courts of the United States, and the superior courts of all the states.

And right here I desire to call the *special* attention of the court to the elaborate note of authorities cited in the report of this very case, 31 Federal Reporter, page

676, and to single out one of the cases and quote therefrom, to show how thoroughly and completely the doctrine, that a corporation as to creditors could not sell its stock at less then par, has become interwoven with the jurisprudence of the Federal Courts.

I refer now to the case of Flinn, Assignee *vs.* Bagley, 7 Federal Reporter, page 785. The case is, in the principles involved, almost on all fours with the case at bar, and it shows how so able a judge as Judge Brown, (who presided in the case) viewed the law as laid down by this court; and I submit that this case was a stronger case for the defendants than the case at bar. If there ever was a case, where upon the peculiar facts, the strict rule laid down by this court should have been held not to apply, and which appealed to the mercy side of the court, if there can be such a side, it was this case of Flinn *vs.* Bagley, and so much so was it, that the very learned justice almost groaned at being compelled to apply the rule. Let us look at it, and I am sure we will see, that the rule adopted by Judge Brown, and his construction of the decisions of this court, has been overturned and abrogated by the present decision.

Flinn was the assignee of the Detroit Novelty Works (quoting from Judge Brown's decision, page 786):

"The Novelty Works found itself *embarrassed for means*, and resolved to "raise money by increasing its capital stock. As its existing stock, however, "was worth only *two-thirds* of its *par value*, it was *obviously impossible* to sell "its new stock at par, since all the stock would stand upon an equal footing, "and *no one could be found to pay a dollar for that which was worth only* "*sixty-six and two-third cents*. There was, therefore, no recourse but to "issue *new stock at its real value*. All the stockholders of the corporation "having assented to this arrangement it was evidently *no fraud upon them*. * "The corporation itself would be estopped to claim * more. Neither was it "a fraud upon the existing creditors, since the assets of their debtors were

"increased to the amount of money actually paid in, and to that extent they "were benefitted. *It is then only a fraud upon future creditors that exception "can be taken to the transaction.*"

I submit that here is a wise discrimination which goes as far in favor of the stockholder as any in the books; but in the case at bar, the plaintiff in error became a creditor nearly three years after the stock was taken, and in the meantime the company was in full exercise of its franchises, and the outside world had no means of knowing its true financial condition, or whether it was earning enough to pay its interest and expenses. As was said by Judge Adams, in Jackson *vs.* Traer, it was inviting credit, borrowing money, issuing and selling bonds; in the meantime Green was posing as the owner of nearly one hundred thousand dollars ($100,000) of its stock, and the Construction company members to two hundred and fifty thousand dollars ($250,000) more, showing thereby large assets aside from borrowed money; and by the means of this very stock they were capable of controlling the corporation, and of holding it out as worthy of credit for two million dollars ($2,000,000) of bonds as late as June, 1874, soon after which the plaintiff was so unfortunate as to invest in them his life-time earnings, confiding, so far as the record shows, in these false appearances of solvency held out by the managers of this corporation.

The Michigan Statute is similar to that of Iowa, and the same rule was adopted by Judge Brown as that of our Supreme Court, and under the controlling decisions of this court.

After discussing the English decisions, which it was conceded were favorable to defendants, Judge Brown

proceeds, on page 790, to show that a different rule has been established by this court, citing:

Upton *vs.* Triblecock, 91 U. S., 45;

Chubb *vs.* Upton, 95 U. S., 666;

Pullman *vs.* Upton, 96 U. S., 328;

Hatch *vs.* Dana, 101 U. S., 205;

which he says contains little more than a repitition of the same principle. The court then proceeds, page 791, to show that Hawley *vs.* Upton, 102 U. S., 314, is directly in point, treating the question of taking stock by subscription and taking it by an oral agreement to purchase it at a given price below par as immaterial, and he says:

"The Supreme Court held him (Hawly) liable upon the theory that the "company *could not sell its stock at less than par*, and that his agreement "amounted in law to a subscription for stock, &c., &c."

And on page 792:

"It was said by the Chief Justice in Hawley *vs.* Upton: *All that need be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock of the company represents.*"

The court continues in treating of the liability thus:

The general liability to a subscriber to pay for stock when wanted to meet liabilities of the company is equally applicable, when it appears that defendants *received certificates of stock for which they paid only two-thirds of its par value.*

Again, page 792:

"The case is a hard one. *The company was embarrassed for funds. Defendants agreed to take stock at what it was really worth. It is clear, no fraud was intended* and that they must be held liable on an implied agreement to pay more for benefit of creditors than they had expressly agreed to pay for the benefit of the corporation. It is a hardship, however, from which I see no way of relieving them, consistent with the views of the Supreme Court in Hawly *vs.* Upton, and a decree must be entered for complaint."

If this case is the law and the rule of this court, as has been held, then how can it be said that the opinion

in the case at bar does not overrule it? The parties seem to have submitted, seeing no way out of the difficulty, as I cannot find they ever appealed to this court.

Now, to show how generally this doctrine is understood, and how uniformly applied, I call attention to Stutz *vs.* Handley, 41 Federal Reporter, 531, where Judge Jackson went into a critical examination of the whole doctrine, and all of the cases, and especially those passed upon by this court. The decision is too long and exhaustive to quote at large, but on page 547 the court refers to the decision of this court, upon which the plaintiff in error, relied with so much confidence in the argument here, and in citing Hawly *vs.* Upton, 102 U. S., 316, it is said:

> "The shareholder's express written agreement with the corporation was "to pay two hundred dollars ($200) for ten shares of stook ($1,000). As "between him and the corporation this was valid, but as against creditors "it was held not binding, and he was required to pay the eighty per cent, "the court saying that '*as the company could not sell its stock at less than par, "what was done amounted to a subscription for the stock and nothing else.*' "

And on page 548 the learned judge holds that the taking of shares at less than par, is upon well settled principles equivalent to a subscription and promise to pay the unpaid portion at the demand of creditors. Many new intensely interesting and able cases are cited, all tending in one general direction, but, as it seems to me, all of which are necessarily reversed and overruled, if this court adheres to the decision here. The whole doctrine must be reformed, and a new line of thought adopted, and a new element ingrafted upon the principles, heretofore supposed to control, and a necessary modification of the rule.

Now begging the indulgence of the court, I desire to call attention to the cases cited in the opinion, which are supposed to support in a measure the ruling. And first, I now propose to keep the promise made in the fore part of this brief, and show that the case of Gelpecke *vs.* Blake, 19th Iowa, 263, *did not in any manner involve the rights of creditors*, nor the questions raised in this case. The court has entirely misapprehended that decision, and neither that nor any other final decision yet made by the Iowa Supreme court, held that the stock of a corporation, under the Iowa law, could be disposed of by the corporation at less than par.

I now quote from the decision referred to, Gelpecke et al. *vs.* Blake, 19th Iowa, page 268:

"This plea is demurred to because it fails to state that the releases "alleged therein were made with the consent of *creditors and stockholders* of "said company. The point suggested is unsound and cannot be supported. "That there are creditors, is mere assumption, it does not so appear from the "face of the plea.

"If there were creditors at the time, and the position assumed by the "demurrer a valid one, the plaintiffs could avail themselves of it on the trial "* * to the same extent as if they had replied to the facts in avoidance, "&c. *It will be time enough for the courts to take care of the rights of creditors "when they are judicially advised by the pleadings or evidence in the cause that "the same are in jeopardy.*"

How could anything be plainer than that in this case none of the legal questions as to the rights of creditors were involved; in fact an examination will show that while this case was in the Supreme Court of Iowa twice, no question of the rights of creditors arose; it was first reported in 15 Iowa, page 389.

The suits were brought by a party who had purchased the subscription, and it was shown that prior thereto the company and the subscriber had previously settled

the matter in a perfectly legal and proper way. The subscription contained a condition, with which the railroad company could not comply; the consideration failed, and the subscriber paid a small sum and was released. This was not only legal, but honest and right, and we suppose that under these circumstances even creditors could not have complained, but no such question was before the court. And there has never been any construction on the part of the courts of Iowa of the statute, upon which Green or his co-partners in this transaction had any right to rely, as supporting the view, that they could take this stock and escape liability; if any mistake was made by them in this respect, it was a mistake of law; and the decision we have cited in this court of Scoville *vs.* Thayer, 105 U. S., shows that such a mistake cannot avail in defense of the claims of creditors.

Now one word about New Albany *vs.* Burke, 11 Wallace, 96. I beg to suggest that this case is not parallel. The city had subscribed for the stock and agreed to pay in its bonds, which were worth at the time par, so far as the record shows. Its subscription was also conditional, the bonds were only to be paid as the road was built from one point to another. So far as the work was done, and the company entitled to the bonds, they were delivered. This constituted full payment of the subscription; the company abandoned the work and never became entitled under the subscription to any more of the bonds than were delivered.

The company had not sold the bonds, but had hypothicated them. After this, tax-payers instituted suits attacking the validity of the bonds, the constitutional

right of the city to issue them, their credit was injured and their value very much depressed. In those circumstances the city purchased them from the holders at a nominal figure, paying thirty-six thousand dollars ($36,000) in cash *and surrendering* the *paid-up stock*. Of course these transactions are properly upheld by this court, for in the very language of the opinion in this case, as quoted by your Honors, on page 11 of the printed opinion, it is said:

"Besides as we have seen the arrangement assailed by the complainants "was not a modification of the subscription previously made or a bonus given "for a release. *It was rather a purchase of the city debt.*"

Now the court treated the transaction the same as if the delivering of the bonds in the first instance was payment in full of the subscription to the stock, and the re-purchase for the money and the stock the same as if it had been done by a third party. This was right, no doubt, and in no manner conflicts with the rule we are contending for.

But even in this case the court had some hesitation and doubt, which was relieved by the consideration of the laches of which plaintiffs were guilty, in commencing the proceeding (see page 107):

"No excuse is shown for the long delay, and it is difficult to see why "they are not barred by the rule in equity, analagous to the statute of limita-"tions."

But how can the facts in the case at bar be compared with those in New Albany *vs.* Burke? How can that decision, which expressly declares that the transaction was no modification or release of the subscription, be said to sustain a holding when there is a direct agreement to part with the stock at twenty per cent of its

par value; or, in other words, allow a taker, who is in fact a subscriber, to have full paid shares on payment of twenty per cent, and thereupon to issue to him a false certificate, giving him powers and rights to which he was not entitled, and thus misleading the public as to the actual capital of the company?

If this can be done, then the capital stock of a corporation is no protection to creditors, for regardless of the amount of that stock, to which alone the creditors may look, and of which notice to the world is required to be given, and regardless of the actual amount paid, of which like notice is required, any corporation may issue its full paid shares for a nominal consideration, and if for twenty per cent, then for ten, or five, or one; the only thing necessary is to show that it made things better, and that there was no actual fraud, no moral turpitude in the transaction. Just as though it could be possible to notify the world that that three hundred and fifty thousand dollars ($350,000) of full paid stock had been sold, when in fact only seventy thousand dollars ($70,000) in an old debt had been paid. I submit to your Honors, that the whole profession will be startled with the far reaching effect of this decision, and with the impression that the logic of the dicision leads directly to an abandonment of the long settled rule, a conclusion which I believe this court would reach if a re-argument is granted.

III.

Shortly but earnestly I beg leave to direct the attention of the court to another phase of the case at bar, which seems to have been overlooked by the court,

to-wit: The question raised by instruction prayed for by plaintiff, and set out on page 9, of my original brief, being instruction No. 4.

"If the railway company, after the issue of said stock, continued to transact business and to create indebtedness, and in fact afterwards issued the bonds on which this suit is brought, then such acts were a representation that it was a solvent and going concern, and it and its stockholders would be estopped from claiming any exemption by reason of insolvency, &c."

The record shows that to all appearances, when plaintiff's debt was made and the bonds issued, the railway company was a prosperous concern. It was not in liquidation, nor did it finally surrender till 1875; the plaintiff had nothing to advise him of the embarrassed situation of the company. He became a creditor without knowledge of the state of affairs or how the stock was issued. Nothing was disclosed to him to put him even on inquiry. The situation in 1872, when the stock was issued, could not have been worse then many times has existed in corporations which finally pulled through, and the outside world was no wiser for their troubles.

If the prospect of success had not been good no one would have taken stock, neither could the company have continued to carry on its affairs for more than three years. This alone shows that the situation when the stock was issued was sufficiently promising for it to have been quite an inducement to get it at twenty per cent. Also, that outsiders were liable to be induced to lend credit to the company, just as the plaintiff did.

Every element of an estoppel exists, the representation of solvency, and the issuance of stock it must be conclusively presumed led the plaintiff to part with

his money upon the belief that the company was solvent, and its issued stock paid-up. How now can it lie in the mouth of the company or its stockholders to say: O, the stock was not worth any thing so we took it, at less than par, because we could get nothing else. In the name of reason, if it was worthless, why should they have taken it at all, and if the company was insolvent, why did they issue bonds and pretend that they were good and would be paid? And why should the plaintiff suffer, who was innocent and confiding, instead of those who by their acts caused his loss and his suffering. Those who knew but would not tell, and who still hoped to reap a rich harvest out of the proceeds paid for bonds by plaintiff and others. Even if on general principles the court should deem the decision on the main question right, yet, it seems to me, that these facts take the case at bar out of the ruling, and upon the principles of estoppel would entitle plaintiff to recover.

I respectfully ask the court for a re-hearing and argument, and upon a more full enquiry and presentation of the authorities, I believe the court will come to a different conclusion.

Respectfully submitted,

P. HENRY SMYTH,

For Plaintiff in Error.

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vs.
JAS. L. BEVER, *Administrator of the Estate of Geo. Greene, Deceased*, DEFENDANT IN ERROR. } No. 116.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR SOUTHERN DISTRICT OF IOWA.

P. HENRY SMYTH, for Plaintiff in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The material facts involved in the case are: That on June 4, 1874, the Burlington, Cedar Rapids & Minnesota Railway Company, a corporation organized and existing under the general corporation laws of the State of Iowa, issued certain bonds bearing interest at eight per cent. per annum, as shown by coupons therefor. The plaintiff (who is plaintiff in error here) came to be the owner of fifty of these bonds of $1000 each; the corporation having defaulted on the interest, plaintiff brought suit against it in the Circuit Court of Linn county, Iowa, (Record, p. 20) and on the 4th day of June, 1878, recovered judgment for the sum of sixty-five thousand

five hundred and seventeen dollars ($65,517) and costs (printed Record, p. 19). Upon this judgment plaintiff, on July 22, 1880, caused execution to issue, under which the sheriff made a demand of the vice-president of the corporation to be shown property upon which to levy, which he failed to do, and the writ was returned *nulla bona* (printed Record, pp. 19–20). Thereupon on the 5th day of July, 1881, plaintiff, a citizen of Ohio, brought this suit against the administrator of the estate of George Greene, a citizen of Iowa (his death and due appointment of defendant being shown) upon the alleged ground that said Greene, prior to his death, was a holder of nine hundred and ten shares, one hundred dollars ($100) each, of the capital stock of said railway company, upon which only twenty per cent. had been paid, leaving eighty per cent. unpaid (printed Record, p. 1), which upon nine hundred and ten shares would amount to seventy-two thousand eight hundred dollars ($72,800), a sum sufficient to pay plaintiff's judgment.

The defendant sought to escape liability by pleading: 1st, a general denial of the facts; 2d, that the railway company became totally insolvent and ceased to do business in May, 1875, and had not since then exercised its franchise, and that plaintiff's debt was due in 1875, and that by the delay in bringing suit the action was barred by limitations; there was a third count in the answer alleging a waiver, but no evidence was introduced in support of it and it was abandoned and the court overruled the second count setting up the Statute of Limitations.

Other material facts established by the evidence were (see Bill of Exceptions, p. 19, printed record): that about March 1, 1872, in a settlement between a

construction company and said railway company for work done by the construction company in building the road of the railway company there was found due from the railway company to the construction company seventy thousand dollars ($70,000) in cash. But the intestate, George Greene, was at that time president of the railway company and also a member of the construction company, and that he continued to be president of the railway company till February, 1875.

The railway company, at the settlement in 1872 (referred to), was unable to pay the seventy thousand dollars ($70,000) and thereupon it was agreed that in lieu of said payment it should deliver to the construction company three thousand five hundred shares of one hundred dollars ($100) each of the capital stock in full payment of the indebtedness. This stock was issued by the railway company directly to the members of the construction company as full paid stock, and nine hundred and ten shares were issued to said George Greene as a member of the construction company, and as his share of the three hundred and fifty thousand dollars ($350,000) issued.

This seventy thousand dollars ($70,000) was the only payment ever made on the issue of three hundred and fifty thousand dollars ($350,000) of the stock, so that only twenty per cent. of the par value was ever paid by any one.

The said railway company was an Iowa corporation, regularly organized under the general law of Iowa, and continued to carry on its business, in its own name, under corporate franchises, by operating its road as a railway company, up to the *19th day of May, 1875*, at which time, the defendant alleged, it became totally insolvent.

Previously, and about February 7, 1871, the executive committee of the said railway company had adopted a resolution authorizing the treasurer of the company in the adjustment or liquidation of claims to use the stock of the company, provided not less than twenty per cent. of the par value could be realized.

At the time of the transaction above referred to, by which the seventy thousand dollars ($70,000) was paid by the issue of three hundred and fifty thousand dollars ($350,000) of stock, the construction company was reluctant to take the stock, but the transaction was made at the instance of the intestate, George Greene; and it was shown that at that time the stock had no market value; the net earnings of the railway in 1871 and 1872, and thereafter, were not sufficient to pay all of the interest on its bonded indebtedness, and the company had a floating debt of over half a million dollars ($500,000); it had no way of paying this debt and its interest, except its net earnings and such proceeds as could be realized from its stock, its bonds and by borrowing. This was done under the general denial, for there was no special plea setting up either the resolution or the value of the stock.

In May, 1875, its bonded and floating indebtedness had been largely increased, and the company had no means of paying its floating debt. The first mortgage was foreclosed and the property of the company sold under the decree, in July, 1876. On February 10, 1875, George Greene transferred his shares to John I. Blair, a man of undoubted responsibility.

But it was also shown that, at the time this was done, the railway company was a debtor of an iron company, of which Blair was a large owner. Clews had failed, and the road was bound to go into bankruptcy, *unless*

something was done. Blair was requested by the railway managers to take the presidency of the road and see if it could be extricated, offering to transfer to him a majority of the stock, the object being that he might elect a board of directors such as the creditors would have confidence in, and that he might be secure in his office. Or he thought other arrangements could be made with bondholders and creditors, and something saved to stockholders. If nothing could be accomplished, the stock was to be returned.

This arrangement with Blair was a failure, and on July 5, 1877, all of the stock was returned to the owners who had transferred it to Blair, the nine hundred and ten shares having been re-transferred to George Greene at said last named date. It is proper to state that this transfer to Blair was not relied on by defendant, nor was it considered by the court. And so matters stood, both at the time plaintiff's suit was brought against the company, and also when this suit was brought against his administrator. The case was tried to a jury in the Circuit Court, and under these facts, the statute of the State and the principles of law involved, the plaintiff claimed the right to recover so much of the unpaid eighty per cent. on the stock as was sufficient to pay his claim, and at the trial requested the court to charge the jury as shown by instructions herein set out, but the court refused to so charge and took the case away from the jury and held as a matter of law, under the issues and facts proven, that defendant was not liable. The jury, under this direction, returned a verdict for defendant and judgment was rendered against plaintiff, and he excepted in due form.

The sections of the Iowa Incorporation Laws, under which plaintiff sought to recover, and which are involved and applicable, are as follows:

CHAPTER I, TITLE 9, CODE OF IOWA.

"SEC. 1058. Any number of people may associate themselves and become incorporated for the transaction of any lawful business, &c.

"SEC. 1059. Defines their powers and enables such corporations to make contracts, transfer and acquire property, possessing the same power in such respects as individuals.

"SEC. 1060. Previous to commencing business they must adopt articles of incorporation which must be signed, acknowledged and recorded, &c.

"SEC. 1063. Notice must be given of place of business, nature of same, amount of capital stock, &c., &c.

"SEC. 1078. The transfer of shares is not valid, except as between the parties thereto, until it is entered on the books of the company, so as to show the name of the person by and to whom transferred, the number, &c., of the shares, and the date of the transfer, *but such transfer shall not in any way exempt the person making it from any liability of said corporation created prior thereto.* * * *

"SEC. 1082. Neither anything in this chapter contained, nor any provisions in the articles of incorporation shall exempt the stockholders from individual liability to the amount of the unpaid installments on the stock owned by them, or transferred by them for the purpose of defrauding creditors, and execution against the company may, to that extent, be levied upon the private property of any such individual.

"SEC. 1083. In none of the cases contemplated in this chapter can the private property of stockholders be levied upon for the payment of corporate debts, while corporate property can be found with which to satisfy the same; but it will be sufficient proof that no property can be found, if an execution has issued on a judgment

against the corporation, and a demand has been therein made of some one of the last acting officers of the body, for property on which to levy, and if he neglects to point out any such property.

"SEC. 1084. Before any stockholders can be charged with the payment of a judgment rendered for a corporation debt, an action shall be brought against him, in any stage of which he may point out corporate property subject to levy, and upon his satisfying the court of the existence of such property by affidavit or otherwise, the cause may be continued or execution against him stayed until the property can be levied on and sold, and the court may subsequently render judgment for any balance which there may be after disposing of the corporate property; but if a demand of property has been made, as contemplated in the preceding section, the costs in any event shall be paid by the company, or the defendant therein, but he shall not be permitted to controvert the validity of the judgment rendered against the corporation unless it was rendered through fraud and collusion."

ASSIGNMENT OF ERRORS.

The plaintiff in error says, that in the record and proceedings aforesaid there is manifest error, in this, to-wit:

I.

The court below refused to give certain instructions to the jury as the law of the case as requested by plaintiff, and which refusal was duly excepted to at the time by plaintiff. Said instructions, as requested, were as follows:

"1. If you find from the evidence that the intestate, George Greene, was the owner of nine hundred and ten shares of the stock of the Burlington, Cedar Rapids & Minnesota Railway Company, and that only twenty cents on the dollar was paid thereon and taken by him with full knowledge of the fact, and that he was the owner of said shares at the time the debt was contracted upon which the plaintiff recovered his judgment, then he would be liable for the unpaid part of said stock to the plaintiff."

Printed Record, p. 26.

It was error to refuse this instruction. Under the Statutes of Iowa and the law of the land, he could not take stock without becoming liable to creditors for all unpaid amounts up to par, and the statute expressly provides (Sec. 1078) that no transfer of the stock shall exempt the holder from liability created prior to the transfer, and no action of his or of the company could change his liability, for the law makes it a trust fund for creditors.

II.

"2. If you find from the evidence that on the 28th day of March, 1872, the Burlington, Cedar Rapids & Minnesota Railway Company was indebted to the construction company in the sum of seventy thousand dollars ($70,000) in cash; that the decedent, George Greene, was a member of both companies, and that the said railway company not being able to pay the money at the time, it was agreed that instead of payment in cash of said sum, that the railway company should issue to said construction company three hundred and fifty thousand dollars ($350,000) of its capital stock, and that thereupon there was issued to said George Greene, as a member of said construction company, and he received ninety-one thousand dollars ($91,000) of said stock, and that no other payment except the said twenty per cent. thereon was ever made, then the said Greene would be liable to the plaintiff for the unpaid eighty per cent if the debt of the plaintiff was created while said Greene was a holder of said stock, and if you so find, then the plaintiff is entitled to recover."

It was error to refuse this instruction, for the same reasons assigned above, and because the Statutes of Iowa and the law of the land forbade the issue of stock at twenty per cent. as full paid, and said Greene could not take the same without incurring a full liability to creditors. He and the company had no power to change this liability or to relieve him from it except by payment.

III.

"3. The fact (if it was the case) that at the time said stock was so issued it had no market value, would not in any manner relieve said Greene from his liability on account thereof."

It was error to refuse this instruction, for the law makes no distinction in reference to corporations, between those where stock is marketable and those where stock is not; any other doctrine would afford a device by which all liability could be avoided of insolvent corporations, and their stockholders; a different rule than that involved in the instruction would introduce a new doctrine into the law of corporations.

IV.

"4. If the said railway Co., after the issue of said stock, continued to transact business and to create indebtedness, and, in fact, afterwards issued the bonds upon which this suit is brought, then such acts were a representation that it was a solvent and going concern, and it and its stockholders would be estopped from claiming any exemption, by reason of the fact that said company may have been insolvent, in legal contemplation, at the time said stock was issued."

It was error to refuse this instruction, for the very fact that the railway company was exercising its franchises, operating its business as a common carrier and issuing stocks and bonds, was sufficient to justify a creditor in believing it a solvent and going concern; and there is no principle which requires the creditor in such case to take notice of its failure to pay interest and its floating debt, and its acts would be a complete estopple against a stockholder.

V.

"5. If the jury are satisfied from the evidence that George Greene, the intestate, took from the Burlington, Cedar Rapids & Minne-

sota Railway Company nine hundred and ten shares of stock upon which only twenty per cent. was paid, then the law makes his administrator liable to creditors of the corporation who have recovered judgment and had executions issued, demand made and returned without finding property for the unpaid eighty per cent. of such stock, if so much is necessary for the purpose of paying such debts."

It was error to refuse this instruction, for in case the stock was unpaid, as alleged, the statute makes the stockholder liable, after judgment against the company and execution issued demand for property and a return *nulla bona*.

Sec. 1083, Code of Iowa.

VI.

"6. *Fifth*: An agreement between the intestate and the Burlington, Cedar Rapids & Minnesota Railway Company that the stock should be issued at twenty per cent. would not bind the plaintiff, and as to him the defendant would be liable for the par value of the stock, or any unpaid portion thereof."

It was error to refuse this instruction, because, upon the principles before stated and well established, under the Iowa Statute and the general law, no device can be adopted between the corporation and the stockholders which will relieve the latter from liability for the par of the stock.

VII.

"7. The defendant, upon the evidence introduced and the conceded facts, is liable, and this plaintiff is entitled to recover, and you will find for him in the amount of the unpaid stock owned by decedent, George Greene, which is shown to be eighty per cent. on ninety-one thousand dollars ($91,000)."

It was error to refuse this instruction. It was a true interpretation of the law. There was so little conflict

in the evidence that the court decided the case upon the law; in this view the plaintiff and not the defendant was entitled to judgment and the court should have given this instead of the one for defendant.

The exception of the plaintiff to the refusal of the court to give these instructions was noted at the time and allowed.

Printed Record, p. 27.

VIII.

It was error not to give said instructions from one to six inclusive as a charge to the jury, as under the Statutes of the State of Iowa and by the law of the land, said Greene became liable for any portion of the stock taken and owned by him which had not been paid, and it was beyond the powers of the corporation, either by an action of its executive committee, or by its insolvency, to relieve him from liability for any unpaid portion of the stock, and the corporation could not issue its stock at less than par, so far as creditors were concerned, whether it had a market value or not. And the court did not give any other instructions covering the legal propositions prayed for in these requests.

IX.

The court erred in taking the case away from the jury and in holding and charging as follows, after refusing the instructions prayed for by plaintiff, to-wit:

Printed Record, p. 27.

"But the court further held as matter of law that upon the evidence set out in the record and facts proved thereby, that the said George Greene, deceased, by taking the nine hundred and ten shares of stock of the Burlington, Cedar Rapids & Minnesota Railway Company upon which twenty per cent. only was paid, as

shown by the evidence, did not become liable for anything further on account thereof to creditors of the corporation, and thereupon instructed the jury that the defendant was not liable to plaintiff by reason of the facts proved and that they should find and return a verdict for the defendant."

Printed Record, p. 28.

Because, under the Statutes of the State of Iowa and by the law of the land, the taking of nine hundred and ten shares of the stock of the corporation which was a trust fund for creditors, the intestate became liable for the par value, and as only twenty per cent. was paid, he was, and his estate is, liable to plaintiff for the unpaid installments, and nothing in the record shown relieves his estate of the liability.

X.

There is also error in this, to-wit: that by the record aforesaid (printed record, p. 34) judgment was given for the defendant against plaintiff upon his said demand, whereas by the law of the land the said judgment ought to have been given for the said plaintiff. And the said Newell D. Clarke, plaintiff, prays that the judgment aforesaid may be reversed, and that he may be restored to all that he has lost by reason of said judgment.

P. Henry Smyth,
For Plaintiff in Error.

BRIEF OF THE ARGUMENT.

I.

The contention in this court involves the correctness of the rulings of the court below in refusing to give to the jury the instructions prayed for by the plaintiff, and in passing upon the case as upon a demurrer to the evidence, and directing the jury to find for defendant, and in entering judgment on the verdict against the plaintiff; and it may be assumed, therefore, that the case resolves itself into one main question, to-wit: Whether, under the facts established or which the evidence tended to establish, the defendant, as the representative of George Greene, was liable to plaintiff, a judgment creditor of the company, for the unpaid eighty per cent. of the stock taken and owned by him in the railway corporation?

In the argument it will not be necessary to take up the instructions asked by plaintiff, separately. Some involve the same principles in different forms and may be argued together. Thus instructions 1, 2, 5 and 6 may be discussed together. They involve the general rule applicable. Why should they not have been given? Let us insert them here substantially, at the risk of tedious repetition, but for convenience.

"If you find that George Greene was the owner of nine hundred and ten shares of the capital stock of the railway corporation, and that only twenty cents on the dollar was paid thereon, and taken by him with full knowledge of the fact, and that he was the

owner of said shares at the time the debt was contracted upon which plaintiff recovered his judgment, then he would be liable to plaintiff for the unpaid portion of the stock. (2) If in March, 1872, the railway company was in debt to the construction company in the sum of seventy thousand ($70,000) dollars, and George Greene was a member of both companies, and it was agreed that instead of payment in cash the railroad company should issue three hundred and fifty thousand ($350,000) dollars of its capital stock, and that there was issued to Greene as a member of the construction company ninty-one thousand ($91,000) dollars of said stock and no payment was made thereon, except said twenty per cent., then Greene would be liable to plaintiff for the unpaid eighty per cent., if the debt of the plaintiff was created while said Greene was a holder of said stock. (5) If Greene took from the railroad company nine hundred and ten shares upon which only twenty per cent. was paid, then the law makes his administrator liable to creditors of the corporation who have obtained judgment and have execution returned without finding property for the unpaid eighty per cent., if so much is necessary for the purpose of paying such debts.

"5. And an agreement between Greene and the railway company, that the stock should be issued at twenty per cent. would not bind the plaintiff, and as to him the defendant would be liable for the par value of the stock or any unpaid portion thereof."

These requests were all applicable to the facts presented by the record. Greene was president of the railway company, and at the same time a member of the construction company, and, therefore, fully cognizant of the whole transaction which took place in March, 1872. The company, at the time, was a going concern, and continued to be for more than three years after this stock was issued. More than two years afterwards, to-wit: in June, 1874, the company was still going on struggling for success, and apparently with hopes of overcoming

all of its financial difficulties, and issued and put upon the market the very bonds upon which plaintiff's judgment was obtained (printed record, page 20). The bonds show that they are part of a series amounting, in the aggregate, to the sum of two million dollars ($2,000,000) and one of the seductive inducements inserted in them to give them credit is: "That they are convertible, at the option of the holder, into the capital stock of the company at par." The doctrine of the liability of stockholders, under such circumstances, has become so thoroughly settled by a uniform current of authority that it seems almost a useless labor to undertake to cite authorities.

The record discloses the existence of every material fact necessary to establish a full and complete liability.

Perhaps there is no more clear or forcible expression of the rule than that given by this court in Upton, Assignee, *vs.* Tribilcock, 91 U. S., 47. We quote:

"It is hardly necessary to argue the proposition that if the defendant became holder of shares of the capital stock of this company * * and had paid but twenty per cent. thereof, its creditors were entitled to require of him the payment of the eighty per cent. remaining unpaid.

"The acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder. The capital stock of a monied corporation is a fund for the payment of its debts, a trust fund of which the directors are trustees, for the benefit of its shareholders during its life, and its creditors in the event of dissolution. This duty is sacred and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a foot ball to be

thrown into the market for speculation, its value elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion that the obligation of a subscriber to pay his subscription may be released by the trustees of the company. This has been often attempted, but never successfully. The capital is a fund which the trustees cannot squander or give away."

This decision was in harmony with Upton *vs.* Hansbrough, 3 Biss., 417, and Sawyer *vs.* Hoag, 17 Wall., 610, and followed by Scoville *vs.* Thayer, 105 U. S., 143. The reason upon which the rule rests is so solid and satisfactory that the courts of about all the states have fully recognized it and acted upon it. And none have been more emphatic and positive in their approval than the Supreme Court of Iowa.

Osgood *vs.* King, 42 Iowa, 478.

Goff *vs.* Hawk-Eye Co., 62 Iowa, 694.

The court in this last case says:

"Another thing urged upon our attention is that no part of the stock was fully paid although it was issued as such. There was a mutual understanding that upon payment of fifty per cent. in property, stock should be issued as fully paid. Under section 1063 of the Code (page 6 of this brief), the public has a right to assume where stock has been issued as paid up, that it has been paid for in full in money or in property at a fair value.

"The mode of doing business in this case has for its object to make a show of capital and responsibility not, in fact, possessed."

In Chisholm *vs.* Forney, 65 Iowa, 335, the court said:

"Persons dealing with the corporation had the right to assume that it owned available assets to the amount of the capital stock; that is to say, that in consideration for the stock issued the corporation had received money which would be made available to pay any indebtedness incurred in its business."

It appeared in the case just cited that the only thing the corporation had received for the issue of ten thousand dollar ($10,000) stock, was the transfer to it of a worthless patent, and in regard to this as payment the court say:

"It seems to us, as was said in Osgood *vs.* King, 42 Iowa, 478, that it would be a reproach to the law if under these circumstances the appellants are not individually liable to the creditors of the corporation to the extent of their subscription to the capital stock."

In Jackson *vs.* Traer, 64 Iowa, 469, the Supreme Court of Iowa entered into a most elaborate and exhaustive examination of the question, citing and approving the decisions of this court and those of the higher courts of many of the states. We quote from the opinion on page 478:

"In Wetherbee *vs.* Baker, 35 N. J., Eq., 501, it was held that the officers of a corporation are trustees of its subscriptions to its stock, and hold them as a trust fund, and the trust cannot be defeated by any device short of actual payment in good faith. In Crawford *vs.* Rohrer, 59 Md., 599, it was held that any arrangement among stockholders by which stock is nominally paid for, whether in money or in property, will not be regarded as valid payment as against creditors. In Kehlor *vs.* Lademann, 11 Mo. Appeals, 550, it was held that, while stock might be issued to a creditor in payment of indebtedness, and issued as full paid stock, yet if it was issued for less than its full par value, a creditor could recover the difference. In Morawetz on Corporations, section 374, the author says: 'The issue of paid up shares at less than their par value is not alone a fraud upon creditors, but on other stockholders.' Again, in section 589 the same author says: 'The law is settled that every device by which the stockholders of a corporation seek to discharge themselves from liability to pay their stock in full will be treated as a fraud upon creditors.'"

Now this construction of the law, under and in connection with the Statutes of Iowa, has been adhered to so long and so uniformly by the Supreme Court that the rule may well be claimed to have become a rule of property. In fact, the court below, in its opinion, conceded this to be the general rule, but placed its decision on some supposed exception to that rule, to be hereafter noticed.

The court below seemed to be somewhat influenced, as is shown by its opinion at page 33, printed record, by a resolution passed by what is called an executive committee of the railway company (and not the board of directors) on February 7, 1871 (set out in full on pages 23–24, printed record), by which the treasurer of the company was authorized to use the stock of the company in adjusting claims, provided twenty per cent. of the par value could be realized, and the court seemed to think that this resolution was so *public* a matter that it had the effect to bind subsequent creditors. This was a total misapprehension of the law, for by the authority already cited and many others which might be, it is expressly settled beyond contention that this could not be done, and that even the directors, or the other stockholders (much less an executive committee) could not pass and make effective such a resolution against the rights of the creditors. Instructions 2 and 6 requested by plaintiff, (printed record, page 27 and 13 and 14 hereof), pointed directly to this question, and should have been given.

This court, in Scoville *vs.* Thayer, 105 U. S., 152, has expressly so held. Let us quote:

"The stock held by defendant was evidenced by certificates of full paid shares. It is conceded to have been the contract between him and the company that he should never be called upon for any further assessments upon it. * * * But the doctrine of this court is, that such a contract * * * is a fraud, in law, on its creditors. The reason is that the stock is considered in equity a trust fund for the payment of creditors. It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has the right to presume that the stock has been, or will be, paid up, and if it is not, a court of equity will require it to be paid."

And, under the Statutes of Iowa, a court of law will do the same thing (section 1084, Code, page 7, brief).

It does not appear in the case above cited whether the understanding, or agreement, between Thayer and the company that he should have the stock at twenty per cent. of its par value, was evidenced by any resolution of the company or any other kind of a record entry. In the case at bar there was the resolution, before referred to, of the executive committee. Where it was presented or recorded, or how the proceedings of this committee were entered, was not made to appear. It is immaterial, for the journals, records and proceedings of even the board of directors or stockholders are not open to the inspection of creditors, nor do they constitute any notice of any kind to creditors; and the court below fell into a grievous error when it suggested as a reason for its rulings (record, page 33) "*that the issue of this stock to Greene was not a secret* "*transaction. It was open to the public, &c.*" There is nothing in the evidence to show that it was spread upon the records of the company; but admitting, for the

sake of argument, that it was, this would not make it a public transaction, or one of which a creditor could, or should, take notice; it was just as much a secret transaction as if it had rested in parol, or, after being entered, had been locked in a safety vault beyond the reach of inspection or examination. This point has been expressly ruled in Wetherbee *vs.* Baker, 35 N. J. Eq., 501. The company had adopted a resolution allowing the stockholders a credit on their stock of fifty per cent. which was never paid. Discussing the effect of this resolution, the court says, page 509:

"The complainant had no notice, actual or constructive, of the adoption of this resolution. Entries in the books of a corporation are, as a general rule, competent evidence of the proceedings of the corporation, &c. * * * but such entries are not notice to third persons of the acts or resolutions entered upon its minutes. As to third persons, the books of a corporation are private books, and such persons are not chargable with knowledge of matters there recorded any more than a third person would be chargable with knowledge of entries made against him in the books of a private person."

In Boulton Co. *vs.* Mills, 78 Iowa, 462, there was a formal resolution of the company but it was unavailing. Indeed there can be no question of the correctness of this holding. How could a third party, as creditor, be supposed to have any notice or knowledge of such a transaction of a railroad company any more than if it had been a bank, a partnership, or a private person?

We call attention of the court also to the discussion in this New Jersey case of the rule we are seeking to maintain. The court says, page 513:

"The courts have inflexibly enforced the rule that payment of stock subscriptions is good as against creditors only when payment has been made in money, or what may fairly be considered as money's worth.

"Indeed, courts could not on any other doctrine administer the law of corporations with the immunity of stockholders from responsibility for the debts of the corporation, and the substitution of stock subscriptions in the place of their personal liability, without opening the door to the grossest fraud upon creditors."

And under this doctrine the court held the stockholders liable for the par value, notwithstanding the board of directors, by a resolution duly adopted and entered on the record, had attempted to release them from that liability.

This is in perfect harmony with the whole current of authority. There was no duty resting upon the plaintiff as a creditor to "look beyond the surface of the transaction," and find out that Greene had taken stock at twenty per cent., and that the transaction was in good faith. He had a right to assume that money had been paid for this three hundred and fifty thousand dollars ($350,000) of stock, or that it would be, and he had a right to rely on the rule of law which prohibited the company and Greene from entering into any kind of an agreement which would relieve him from such payment; and if plaintiff had known all about it when he took his bonds, he would have been justified in doing it on the faith of the existing legal duty of the stockholders to pay the remaining eighty per cent.

Under the law of Iowa it is the duty of every corporation to keep posted in its principal place of business, a statement of the amount of capital stock subscribed and paid in, as follows:

CODE OF IOWA.

"SEC. 1076. A copy of the by-laws of the corporation, with the name of all its officers appended thereto, must be posted in the principal places of business, and be subject to public inspection.

"SEC. 1077. A statement of the amount of capital stock subscribed, the amount of capital actually paid in and the amount of the indebtedness in a general way, must also be kept posted up in like manner, which statement must be corrected as often as any material change takes place in relation to any part of the subject matter of such statement."

It will now be seen that while the resolution of the executive committee authorizing the treasurer to issue stock at twenty per cent. was a purely *private matter*, and so far as plaintiff was concerned, a strictly *secret* one, the statute quoted makes the stock subscription or stock issue a public one. When this ninety-one thousand dollars ($91,000) was issued to Greene, and the whole three hundred and fifty thousand dollars ($350,000) to the members of the construction company, the plaintiff had a legal right to assume that so much money went into the treasury or would be put in when needed. The company had to post it, under the statute, as so much stock sold, and it either had to say to the public that three hundred and fifty thousand dollars ($350,000) had been paid in (which would have been false and a gross fraud) or else it had to say that twenty per cent. had been paid only, and that the eighty per cent. was a reserve fund in the hands of the stockholders to meet the just demands

of creditors when wanted. In either case, and in both cases, the liability would remain, and in one case as much as the other. It was and is just like any other obligation, nothing can extinguish it but payment, or forgiveness.

Hence it follows that the resolution of the company is utterly powerless to shield the defendant, and this would be equally true if that resolution had been blazoned in posters all over the offices of the company.

The Supreme Court of Iowa have in later decisions adhered inflexibly to the rule laid down in Jackson *vs.* Traer.

Bolton Carbon Co. *vs.* Mills, 78 Iowa, 460;
Tama Water Power Co. *vs.* Hopkins, 79 Iowa, 653.

Indeed these decisions are but a declaration of the general will, and a construction of the statutory provision contained in section 1082 of the Code of Iowa (page 6 hereof), to the effect that *neither anything in this chapter contained nor any provisions in the articles of incorporation shall exempt the stockholders from individual liability for the amount of unpaid installments, &c.* If the articles of incorporation, which are required to be recorded and made public, cannot authorize the issue of stock at below par, how could a resolution of the company do it?

II.

There remains to be considered one other circumstance, which seemed to have misguided the court below, to-wit: the market value of the stock. It will be noticed that this fact was not set up, or relied upon, by any special pleading on part of defendant, but was

admitted under the general issue (printed record, page 12). The second count of the answer was purely and simply a plea of the Statute of Limitations, which the court held was not good. When plaintiff saw the drift of the mind of the court on this evidence after it got into the record, he sought to meet this question by the third instruction requested (printed record, page 27):

"The fact (if it was the case) that at the time said stock was so issued it had no market value, would in no manner relieve said Greene from his liability on account thereof."

The theory of this instruction was rejected by the court and the opposite theory adopted, and upon this, as the chief reason, the court directed the jury to find for defendant. This made short work of plaintiff's theory, as well as his case, and yet, it is clear the court was not fully satisfied with its holding, as in admitting the force and plausibility of plaintiff's position, the learned judge says, "*I cannot regard it as conclusive.*" We submit that the reasoning of the court, in support of its view that the market value of the stock was a material fact, and a valid defense would undermine the whole doctrine of the liability of stockholders; it is not only opposed to the reason upon which the rule is fixed, but is in the very face of the Statute of Iowa, and in conflict with the decision of the Supreme Court of that state, under the Statute.

The insolvency of the company and its inability to pay its creditors, which are held as the bottom reasons for resorting to the liability of the stockholders, is here relied upon, and with earnestness and force insisted upon, as a reason for the stockholders release. The case in this respect, so far as we can find, stands solitary

and alone. No authority is cited by the court and the decision rests entirely upon the reasoning of the court which is peculiarly falacious. The court will observe that the decision is in direct conflict with that of the Supreme Court of the State of Iowa upon the very same question and state of facts in the case of Jackson *vs.* Traer, 64 Iowa, 483. In that case Traer was a co-defendant with Greene. He had been a member of this same construction company, and as such, had received his share of the three hundred and fifty thousand dollars ($350,000) of stock issued in payment of the seventy thousand dollars ($70,000) due the construction company. Every fact which appears in this case was set up and urged in that; and after a most elaborate review of the authorities, the liability was held to be established. The circumstance we are now considering was pressed most vigorously in the case, but it was unavailing, and this is what the court said on that subject:

"One position taken by defendants is that the stock issued as fully paid was entirely worthless. In our opinion this would not enable the defendants to escape the *statutory liability*.

"If the stock was worthless, as claimed, there was so much the greater reason why the stockholders should not hold themselves out under false pretenses. If the stock was worthless and the contract by which it was issued based upon that theory, as we understand defendant's counsel to claim, it seems to us the conduct of Traer and Greene was without a shadow of excuse; they must have had a motive altogether independent of the value of the stock, and it is difficult to see how that motive could have been other than a corrupt one. They were directors of the railway company, and after the issue of the stock made a transfer to Blair to induce him to become president by giving him a controlling interest.

"Now if the company was insolvent, and the stock worthless, as claimed, the plan must have been we think to put a mere semblance of life into the company and invite credit to which they knew it was not entitled. We know they did invite credit and one of the creditors was the plaintiff.

"* * * We are inclined to think they regarded the stock of some value and hoped, too, that the company would be able to pay its debts and that something would be saved beyond such debts. With this view it is only necessary to say that the stock cannot be treated as fully paid in a proceeding by a creditor under the statute to enforce a liability for the unpaid balance."

Now this decision covers the whole of the case at bar. The reasoning of the opinion is, we think, not only sound but unanswerable.

Indeed if it is the duty of a creditor to go "beneath the surface" in dealings with the corporation, and learn whether or not the capital stock posted under the law as paid up, is in reality and truth so, and upon ascertaining that it was issued at less than par he becomes thereby bound, and from that fact precluded from recovery, then the liability of stockholders, which is the only thing in a case of insolvency to which the creditor can look, becomes a "mere rope of sand."

What facts are there in the record, which, under the rules so firmly established, operate to deprive the plaintiff of his right to recover? The stock taken by Greene was issued February 10, 1872. The company was going on in the regular way, operating its road, contracting and being contracted with. It is shown to have had at this time considerable floating debt, and that it did not earn sufficient in 1871-2 to pay its interest, but the net earnings were sufficient to pay part of the interest,

and that the stock when issued was not worth any thing in the market (not that it was worthless), but it was still holding itself out to the world as a responsible concern. If it was insolvent, this fact must have been carefully suppresed. It was managing its property by its own officers, and in 1874, as we have already seen, nearly two years and a half after the stock was issued, it issued and put upon the market for sale the very bonds which plaintiff purchased and upon which his judgment was obtained. This could not have been done without representing to the world that it had an ability to pay and that it was solvent; that it had large assets derived from its stock which had been issued, and that it either had or would receive from George Greene ninety-one thousand dollars ($91,000), by reason of the stock issued to him.

How could plaintiff in purchasing his bonds know the financial condition of the company, or what the value of the stock was in 1872? And if he had known, how would this estop him from demanding pay from the stockholders? The stock of a corporation stands for and takes the place of the personal and individual obligations of partners, and persons engaged in business; and to allow a stockholder to be held out as owning ninety-one thousand dollars ($91,000) of stock, and in that proportion to manage and control the company, and, in case of success, to share in its dividends as upon paid up stock, and to invite credit upon the strength of those facts, and then when failure comes and creditors seek redress, to allow him to evade his obligation simply because the enterprise was not a success and the stock without market value when issued, is, it seems to us, to overthrow every

principle upon which the stockholders' liability has been supposed to rest.

The Supreme Court of Iowa, in the decision cited, holds that there is no escape from the liability, and especially so under the Iowa Statute. We submit that that decision lays down the proper rule, and that it was error in the Circuit Court to allow a different doctrine to control.

The Supreme Court of Iowa, in The Boulton Carbon Co. *vs.* Mills, 78 Iowa, 460, re-affirm and approve all of its previous decisions, and quote with approval and as sustaining them the decision of this court in Sawyer *vs.* Hoag. And while this question of the market value of the stock was not discussed, it was evidently because it had been settled in the Jackson case. But there was one feature in it discussed in a previous part of this argument, to-wit: The stock had been issued at less than par *in pursuance of a resolution adopted in a regular way by the board of directors of the corporation and entered upon the records*, 78 Iowa, 462. But this had no weight with the court who held the stockholders to a strict accountability.

III.

If we are correct in the views we have already taken, then instruction 4 (printed record, page 27) becomes immaterial; but it was requested upon the theory that even if public and notorious insolvency, prior to the issue of the bonds, had been sufficient to put plaintiff upon inquiry and thereby subject him to the defense set up. Yet, upon the facts disclosed by the record, defendant would be estopped, and as the evidence was admitted

under the general issue, it was proper to raise the question by an instruction to the jury. And we submit that if the insolvency could have any weight, under any circumstances, that in this case it could not.

It was a strange conclusion which the court below reached, that because its stock had no market value that therefore it was worthless and the company insolvent. It is one thing for a thing to have a market value, and quite a different one for it to be worthless.

George Greene, in 1872, when the stock was issued, was president of the company and in charge of its affairs. He must have caused to be posted the fact, under the Statute, that at that date the company was in condition to dispose of three hundred and fifty thousand dollars ($350,000) of its stock to responsible parties, himself among the number. A show of solvency and prosperity was kept up, which could not have been done except by representations of assets and ability to finally succeed, and a studied suppression of its true financial condition. It continued to contract floating indebtedness upon the hypothesis that it was solvent. The very taking of this stock was a representation that its managers had faith in its value and its future success; not only did they continue to transact business in the usual way and to invite and receive credit, but over two years after the taking of the stock they issued bonds in the sum of two million dollars ($2,000,000), put them on the market and invited plaintiff to invest in them, which he did. Was this not a representation of solvency, the ability of the company to pay, and that it was entitled to credit as a prosperous and growing enterprise? Was it not also a representation that the stock was valuable, and that behind

what had been subscribed there was property and responsibility; and, in fact, that the scheme was so promising that a stipulation in the bonds that they might be exchanged for stock at par was a valuable privilege, and that the stock was not only worth par, but that in the time to come it was likely to be worth more? Thus, having got all they could on these bonds, and in other ways, by holding out these very inducements, the company continued to go on, inspired by hope that by some fortunate tide of prosperity, or turn of the wheel of fortune, they would avoid the breakers of bankruptcy, the dangers of which were doubtless fully understood by Mr. Greene, but were absolutely unknown to the confiding creditors; in February, 1875, as a last resort, they called to their assistance Mr. Blair, using this very stock as an instrumentality to induce him to step in and guide them out of their difficulties. The stock was then treated as worth something and the fact that Mr. Blair accepted the presidency was intended to infuse confidence into the public, and especially creditors, and to silence their clamors on the faith that Mr. Blair would not undertake to guide and man a sinking ship.

And only after these efforts all failed and a receiver was appointed on May 19, 1875, was it apparent to the public that the concern was totally insolvent; in fact the defendant in his answer admits that the company has been totally insolvent only since that date (page 12, printed record).

We therefore submit that if upon any principle insolvency and the want of market value of the stock could with knowledge of the facts by a creditor, affect his

right to recover of a stockholder; yet under the above circumstances, defendant was not and is not in a position to avail himself of it, and in this view instruction number four requested is sound in principle and should have been given, to-wit:

"If the railway company after the issue of the stock continued to transact business and to create indebtedness, and in fact issued the bonds upon which this suit is brought, then such acts were a representation that it was a solvent and going concern, and it and its stockholders would be estopped from claiming any exemption by reason of the fact that said company may have been insolvent in legal contemplation at the time said stock was issued."

IV.

It is hardly necessary to refer to the transfer to Blair by Greene, as to its effect on Greene's liability, as it was not insisted upon below and will hardly be here. The opinion shows that it did not enter into the consideration of the court below, and for a satisfactory reason it could not. We refer to it only to show that independent of the proposition that the transfer was only colorable, and that Greene continued to be the owner of it and its return to him put him in same position he was before; there is an express provision of the statute which was embodied in and covered by instructions number one and two already discussed. The provision we refer to is section number 1078 of the Iowa Code, already cited, providing for the transfer of shares, the part we now particularly refer to being as follows:

"But such transfer shall not in any way exempt the person making it from any liability of said corporation created prior thereto."

The bonds held by plaintiff were issued June 1, 1874. At that time Greene was president of the road, and as such signed the bonds (page 21, printed record). He was at that time still the holder of the stock and continued to be president and stockholder up to February 10, 1875, when he transferred it to Blair. Under the above statute the transfer did not affect his liability to plaintiff.

Nor would it have done so if it had been a *bona fide* and absolute sale. But even in that case, if it had done so while Blair held it, a re-transfer to Greene would have fully revived his liability and that was done July 5, 1877 (page 25, printed record).

Bolton Carbon Co. *vs.* Mills, 78 Iowa, 465.

V.

There are exceptions to the refusal of the court to give instruction number seven asked by plaintiff, and in giving that for defendant (pages 27 and 28, printed record.) These may be considered together.

Instruction number seven was requested in view of the declaration of the court that he should order a verdict one way or the other. In this view the plaintiff claimed the instruction should be for plaintiff and not for defendant.

The question as to which view was right depends upon the rules of law, discussed in this brief. If the plaintiff in error is right in his contention as to the rules which should govern, as set forth in the foregoing pages, then it must follow that when the court undertook to take the case away from the jury, and to treat the evidence as so non-conflicting as that there was no issue for the

jury to determine, it was its duty to give instruction number seven requested, and thereby to have decided for the plaintiff. This point being sustained, it logically and necessarily results that the court was in error in taking the opposite view of the law, and in directing a verdict for the defendant. Therefore when this court determines the questions raised under the other errors assigned, it will necessarily decide whether instruction number seven should have been given and whether the direction of a verdict for the defendant was erroneous.

The same legal propositions involved in the one are also in the other and their solution depends on the proper construction of the legal propositions already argued.

If instruction seven should have been given, then that for defendant should not.

But we insist the case should have been submitted to the jury on the instructions asked; or the court should have given a charge of its own embodying the law as we claim it to be, but it refused *all instructions* except to order a verdict for defendants.

The plaintiff in error was a confiding creditor of the railway company. He relied upon the appearances of solvency held out by that company, as they appear from the evidence. He had no means of knowing the real situation nor the secret agreements between the stockholders and the directors. Upon the face of things he was justified in believing in their ability to pay. He did so and thus parted with his money. So far he is a victim.

The intestate, George Greene, was the president of the railway company. He knew all about its affairs; he was seeking to keep it alive and insure its success. He had everything to gain if he could tide it over its financial troubles. He was the author of the scheme to issue to himself and other members of another company this large amount of stock at twenty per cent. of its par value, and in case of success would have received as much of the earnings upon one dollar as other stockholders who had paid in full, would have received on five. It was to his interest to have the outside public believe in the solvency of the company, and it is not presuming too much to say that no doubt he believed himself that some how or other the company would be able to overcome its difficulties, and at the eleventh hour still clung to the belief that Blair would extricate it.

He, as president, signed and issued in 1874 the bonds which plaintiff afterwards purchased. Of these there was in all the large sum of two million dollars ($2,000,000). Here was a solicitation to the public to trust the company, and it is hard to conceive how an honest man could have aided in putting these securities on the market, unless he believed in the ability of the company to pay, and therefore the conclusion must be irresistible that he had faith in his corporation and did not believe it to be utterly or hopelessly insolvent, nor did he believe its stock to be worthless. His last effort to infuse new life into the company by placing at the head of it a man of wealth and reputation as a railroad manager, showed that on the very verge of bankruptcy he yet hoped to avoid it, and was only willing to engage to give Blair half

of his *worthless* stock in case he was successful in planning and carrying out some scheme by which the company could adjust its liabilities, avoid foreclosure and weather the storm, and thus avoid utter insolvency. Which is most consistent with justice, that he or his estate should be the loser, or the plaintiff?

Believing our position to be sound and our cause just, we ask a reversal.

P. HENRY SMYTH,
For Plaintiff in Error.

JAMES D. SMYTH,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 116.

NEWELL D. CLARKE, PLAINTIFF IN ERROR,

vs.

JAMES L. BEVER, ADMINISTRATOR.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR, BY P. HENRY SMYTH.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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I.

The questions of jurisdiction, of both this and the circuit court, raised by defendant in error, are for the first time raised in a brief just filed. As to the jurisdiction of this Court, we understand the argument to be that the record does not show that the sum of $5,000 is involved, and this is reached by the novel claim that the action is a proceeding

in rem, and it is not shown that plaintiff's interest in the fund sought to be reached amounts to $5,000. We do not find among the wilderness of decisions cited by defendant in error anything which supports this view. The record shows that the plaintiff recovered against the railway company a judgment for over $65,000; it shows that upon the stock taken by George Greene of $91,000, only $18,000 was paid, and that he was liable for over $72,000 on the unpaid part of the same. The presumption is that his estate, being solvent, is good for the whole amount, and the court will not presume that it was not. We think it sufficient to say that if defendant in error had intended to make such claim as this it was his duty to prove that the estate was not sufficient to pay all claims, and show that the share coming to the plaintiff was less than $5,000. The record shows that over $65,000, with interest since 1878, is involved. Thus is it made to appear affirmatively that this Court has jurisdiction of the appeal.

II.

The question of the jurisdiction of the court below was not raised in that court. The motion to remand was waived by defendant. After it was filed, and without bringing it to the attention of the court, he consented to a transfer of the case to another division of the district, filed his answer, and proceeded to trial. (Printed Record, p. 12.) The opinion of the court below shows that no question of jurisdiction was before it or passed upon.

The case was properly removable under the act of 18[illegible]. The plaintiff is a citizen of the State of Ohio, and the defendant a citizen of the State of Iowa, and the amount in-

volved is over $65,000, and while it is called a proceeding in probate, it is in all of its characteristics a *suit* between citizens of different States, within the meaning of the act of Congress; it is a controversy involving the right to recover the sum sued for.

Craig *vs.* McArthur, 4 Dillon, p. 474.

The decisions of this Court (it is said in Gaines *vs.* Fuentes, 92 U. S., p. 21) holding that the Federal courts have no probate jurisdiction refer particularly to the *establishment* of wills—confining the word probate to its original meaning. But this is not a proceeding in probate, except so far as that is a designation of the State court where the suit is brought. The proceeding is to all intents and purposes a suit, and has to be prosecuted in the same manner as other suits. Notice must be given and a hearing had, &c., and it is not in the power of the State to deprive a citizen of another State of the right to have his cause heard and determined in the Federal courts.

Payne *vs.* Hook, 7 Wallace, p. 425.

The statutes of Iowa presented by defendant in error show that the probate court is the circuit court, and it is not necessary in bringing actions against an administrator to entitle a cause in probate, and so the supreme court of Iowa decided, reversing the decision of the lower court in Bank *vs.* Greene, 59 Iowa, p. 171.

III.

As to point 3d made by defendant in error, it is sufficient to say that no such question was raised or argued in the

court below. The opinion of the court shows that only the legal propositions named in brief for plaintiff in error were raised and passed upon by the court below, and it is too late to raise them here; it in no manner affects the jurisdiction. Furthermore, the statutes of Iowa, under which the action is brought, provide that it shall be an action at law. Furthermore, all of the authorities relied upon hold that it is not necessary to have the transaction between Greene and the railway company set aside for fraud before proceeding. The decision of the court below was not based on any of the points named by defendant, but solely on the ground that the transaction created no liability.

IV.

The argument of defendant in error on the real questions in the case, it seems to us, is singularly unsound. The courts, in the decisions cited in our original brief, hold substantially that it is not necessary to set aside the transaction for fraud before proceeding against the stockholder.

Phelan *vs.* Hazzard, 5 Dillon, 45, stands solitary and alone, and the Iowa courts have refused to be governed by it; but in the case at bar there could be no reason for such course. The argument that when stock has been paid for in property in good faith it will be treated as a good payment until impeached for fraud has no application here.

No property was given in payment, but $70,000 in cash, or a debt of that amount, was surrendered to the railway company, and for this it issued to Greene and his copartners $350,000 of stock. As to creditors, this was a fraud on its face; it could not have been done in good faith because the

law forbade it. No question of fact could arise as to whether twenty cents were or were not worth one dollar. No issue for trial could be based on such facts. If, therefore, it was not within the power of the corporation to so dispose of its stock for money, the transaction is a fraud in law, without regard to the purposes of the parties, and will be disregarded.

Therefore all the cases cited by defendant about over-valuation of property given in payment, good will, and stock in trade are inapplicable to the case at bar, as none of these elements enter into it. It was virtually a cash transaction, and the only question is whether by paying twenty cents on the dollar in money the decedent could take one dollar in stock and hold it without incurring liability for the unpaid portion.

I submit, under the authorities, it could not be done.

P. Henry Smyth,
For Plaintiff in Error.

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JAMES H. MCKENNEY

SUPREME COURT OF THE UNITED STATES.

October Term, 1890.

No. 116.

NEWELL D. CLARK, PLAINTIFF IN ERROR.

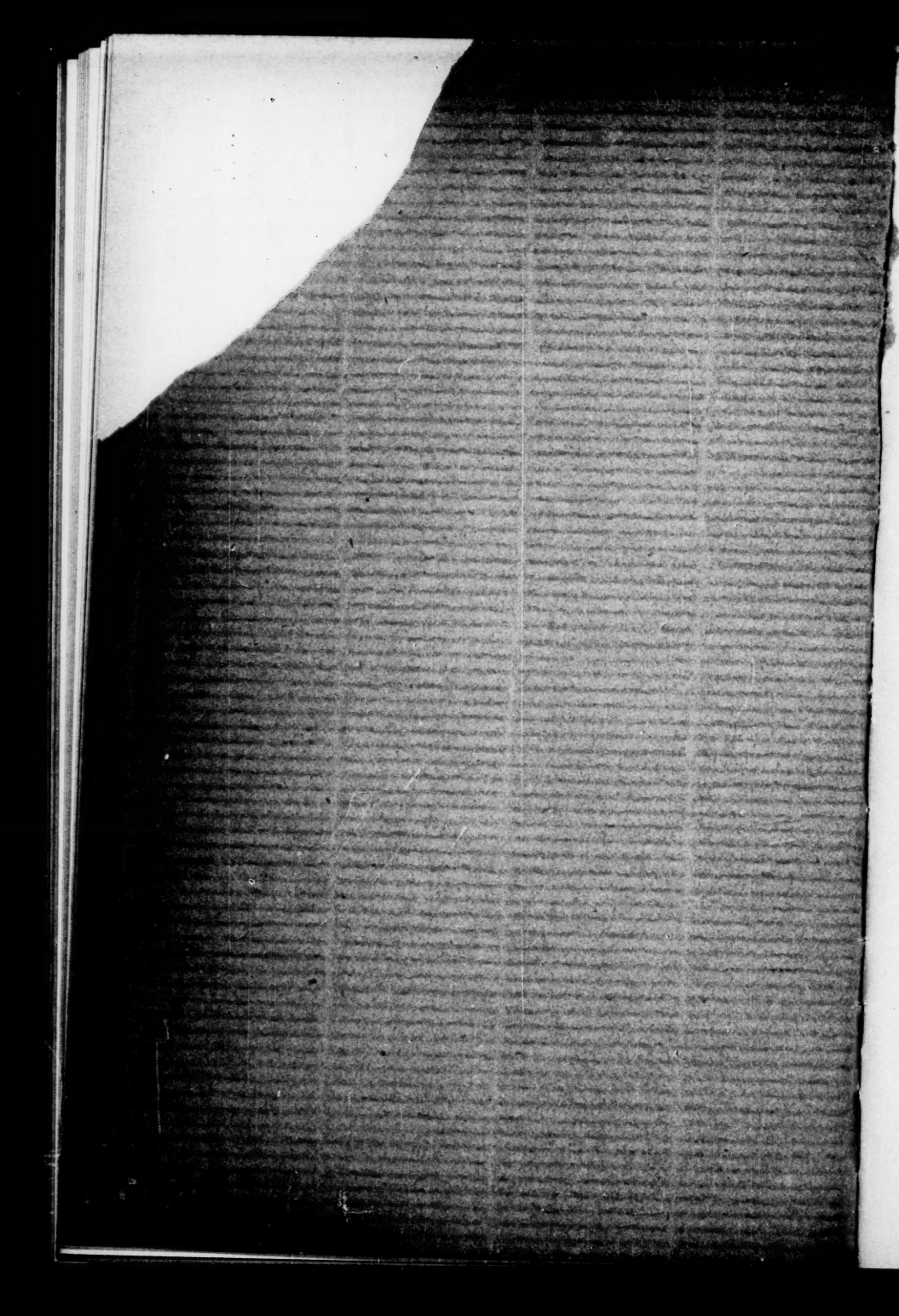
VS.

JAMES L. BEVER, ADMINISTRATOR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF FOR DEFENDANT IN ERROR.

By CHAS. A. CLARK.



Supreme Court of the United States.

OCTOBER TERM, 1890.

NEWELL D. CLARK,
Plaintiff in Error,
vs.
JAMES L. BEVER,
Administrator.
No. 116.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

CHAS. A. CLARK, *for Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

A Railway Company was honestly and fairly indebted to a Construction Company in the sum of seventy thousand dollars for building a portion of its lines. The Railway Company was insolvent and could not pay this sum. It had, by resolution, authorized the issuance of its capital stock at twenty cents on the dollar in the adjustment and liquidation of its debts. (Record 23, bottom.)

It insisted that the Construction Company should receive its capital stock under this resolution, in payment of the seventy thousand dollars. "This stock *had* to take the place of a cash payment." (Record 24, top.) "The stock was not worth anything in the market." (Record 24.)

It was taken by the Construction Company in lieu of the cash

due it, and in full payment of the indebtedness, for the sole and only reason that the Construction Company could not get anything else from the insolvent Railway Company. (Record 22.)

The bond-holders of the Railway Company received the full benefit of the seventy thousand dollars worth of road built by the Construction Company, and for which it received nothing except this worthless stock. These bond-holders having, on foreclosure, become the owners of the railway, including the seventy thousand dollars worth of construction for which nothing was ever paid by their principal, the Railway Company, now seek by one of their number, to compel the members of the Construction Company who received this worthless stock for an honest debt, to pay eighty per cent upon the par value of such stock, on the theory that having lost a perfectly just debt in taking this stock, they still owe four times the amount of the debt which they lost in being compelled to take it in the first instance. That in brief is this case.

This case is a claim in probate against the estate of George Greene, deceased, who was one of the share-holders of the Construction Company, and as such received through the Construction Company his pro rata share of the stock issued in lieu of the seventy thousand dollars in cash due from the Railway Company. Having lost his share of the seventy thousand dollars due the Construction Company, it is claimed that his estate is liable for four times as much more as the original loss, amounting in the aggregate to seventy-two thousand and eight hundred dollars.

The claim was originally filed in probate against the estate of George Greene, in the Circuit Court of Linn county, Iowa, sitting as a court of probate. The plaintiff in error, against the objections and exception of the administrator, removed the claim into the United States Circuit Court for trial, under the act of 1875. A motion to remand was made on behalf of the administrator. (Record, p. 11.) But it does not appear to have been passed upon by the court below. The question of the jurisdiction of the court below will, however, be argued on behalf of the defendant in error.

Under the provisions of the statutes of Iowa, which will be hereinafter set forth, no judgment could be entered on the claim, *except to establish it against the estate*, and no execution could be awarded against the administrator. The claim, when established, would simply *receive its proper percentage as a fourth class claim*, from the fund produced by the assets of the estate. It was inseparably connected that the settlement of the estate, and the marshaling and distribution of its assets, and a mere incident thereto. This is the ground upon which defendant in error insists that the claim was not removable to the United States Circuit Court.

Moreover, there is no showing in the record, directly or indirectly, that the percentage which the assets of the estate might pay on this claim, if established, would amount to the sum of five thousand dollars. It may be that the amount realized on the claim would reach this sum. It may be that it would not. It is a mere matter of surmise and conjecture, and defendant in error, therefore, insists

that the record does not disclose jurisdiction on the part of this court, and that the writ of error must be dismissed for this reason.

The questions above suggested will be considered in inverse order.

I.

JURISDICTION OF THIS COURT NOT SHOWN.

Under the statutes of Iowa, governing the settlement of estates of deceased persons, the plaintiff in error merely shows *an interest in the fund* arising from the estate of the intestate, George Greene. It does not appear that this interest amounts to more than five thousand dollars. Hence the jurisdiction of this court is not shown and the writ of error should be dismissed.

As already pointed out this is a mere claim in probate against the estate of said decedent. The statutes of Iowa governing the distribution of the estate are as follows, as they appear in the Code of 1873, in force and governing this litigation.

OF PROBATE JURISDICTION.

Sec. 2312. "The circuit court of each county shall have original and *exclusive jurisdiction* of the probate of wills, and the appointment of such executors, administrators, or trustees, as may be required to carry the same into effect; *of the settlement of the estates of deceased persons*, and of the persons and estates of minors, insane persons, and others requiring guardianship, including applications for the sale of real property belonging to any such estates, except as prescribed in chapters one and three, of title fifteen." (Said chapter 1 relates to marriages, and chapter 3 to divorces and awarding custody of children.)

OF THE SETTLEMENT OF THE ESTATE.

Sec. 2370. "Within fifteen days after his appointment, the executor shall make and file with the clerk, an inventory of all the personal effects of the deceased of every description which have come to his knowledge, and a list of all book accounts which appear by the books or papers of the deceased to be unsettled. Such inventory shall be so made out as to show separately and distinctly, each by itself, the property inventoried as general assets of the deceased; the property inventoried and which is regarded as exempt under the next two sections; and the book accounts."

Sec. 45. "In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with manifest intent of the general assembly or repugnant to the context of the statute. * * * * * * *

21. The term "executor" includes administrator where the subject matter applies to an administrator."

CLAIMS—PAYMENTS.

Sec. 2406. "Claims against the estate shall be clearly stated,

sworn to, and filed, and ten days' notice of the hearing thereof, accompanied by a copy of the claim, shall be served on one of the executors in the manner required for commencing ordinary proceedings, unless the same have been approved by the administrator, in which case they may be allowed by the clerk without said notice."

Sec. 2409. "All claims filed against the estate shall be entitled in the name of the claimant against the executor, naming him, as executor of the estate, naming it; and in all further proceedings on the claims, this title shall be preserved."

Sec. 2410. "All claims filed and not expressly admitted in writing, signed by the executor with the approbation of the court, shall be considered as denied without any pleading on behalf of the estate."

Sec. 2411. "If a claim filed against the estate is not so admitted by the executor, the court may hear and allow the same, or may submit it to a jury; and, on such hearing, unless otherwise provided, all provisions of law applicable to an ordinary proceeding shall apply."

Sec. 2413. "Demands, though not yet due, may be presented, proved, and allowed as other claims."

Sec. 2414. "Contingent liabilities must also be presented, and proved, or the executor shall be under no obligation to make any provision for satisfying them when they may afterwards accrue."

Sec. 2416. "Suits pending against the decedent at the time of his death, may be prosecuted to judgment, his executor being substituted as defendant, and such judgment shall be placed in the catalogue of established claims, but shall not be a lien."

Sec. 2418. "As soon as the executors are possessed of sufficient means, over and above the expenses of admistration, they shall pay off the charges of the last sickness and funeral of deceased."

Sec. 2419. "They shall in the next place pay any allowance which may be made by the court for the maintenance of the widow and minor children."

Sec. 2420. "Other demands against the estate are payable in the following order:

1. Debts entitled to preference under the laws of the United States.
2. Public rates and taxes.
3. Claims filed within six months after first publication of the notice given by the executors of their appointment.
4. All other debts.
5. Legacies."

Sec. 2421. "All claims of the fourth of the above classes not filed and proved within twelve months of the giving of the notice aforesaid, are forever barred, unless the claim is pending in the district or supreme court, or unless peculiar circumstances entitle the claimant to equitable relief."

Sec. 2422. "After the expiration of the time for filing claims of the third of the above classes, the executors shall proceed

to pay off all claims against the estate in the order above stated, as fast as the means of so doing come into their hands."

Sec. 2423. "Claims of the fourth class may be paid off at any time after the expiration of six months aforesaid without any regard to those claims not filed at the time of such payment."

Sec. 2424. "No payment can be made to a claimant in any one class until those of a previous class are satisfied."

Sec. 2425. "Demands not yet due shall be paid off if the holder will consent to such a rebate of interest as the court thinks reasonable. Otherwise the money to which such claimant would be entitled shall be safely invested until his debt becomes due."

Sec. 2426. "Within their respective classes, debts shall be paid off in the order in which they are filed, subject to provisions of the next section."

Sec. 2427. "If there are not likely to be means sufficient to pay off the whole of the debts of any one class, the court shall, from time to time, strike a dividend of the means on hand among all the creditors of that class, and the executors shall pay the several amounts accordingly."

Sec. 2469. "On the expiration of six, and within seven months from the first publication of notice of his appointment, and sooner if required by the court, the executor shall render his account to the court, showing the then condition of the estate, its debts and effects, and the amount of money received, and, if any received, what disposition has been made of it by him. And from time to time, as may be convenient, and as may be required by the court, he may render further accounts until the estate is finally settled. And such final settlement shall be made within three years, unless otherwise ordered by the court. Such accounts shall embrace all matters directed by the court and pertinent to the subject."

SALE OF REAL ESTATE.

Sec. 2387. "If the personal effects are found inadequate to satisfy such debts and charges, a sufficient portion of the real estate may be ordered to be sold for that purpose."

Sec. 2388. "Application for that purpose can be made only after a full statement of all the claims against the estate, and after rendering a full account of the disposition made of the personal estate."

Sec. 2389. "Before any order to that effect can be made, all persons interested in such real estate shall be served with notice in the same manner as is prescribed for the commencement of civil actions unless a different notice is prescribed by the judge."

Under these provisions relative to the sale of real estate, it is settled by the decisions of the Supreme Court of Iowa that the administrator must make his application for the sale of real estate within the time limited for the filling and allowance of claims against the estate under Section 2420 above cited, and if the administrator fails to do so, the application is barred by the lapse of time, unless the peculiar circumstances of the case are of such a character as to make it

the duty of a court of equity to depart from the general rule; and under such circumstances the application must be made within a reasonable time.

McCrary vs. Tasker, 41 Iowa, 255.
Hadley vs. Gregory, 57 Iowa, 157.
Cresswell vs. Slack, 69 Iowa, 110.

Under this legislation it is also settled by the decisions of the Supreme Court of Iowa that the probate court, appointing the administrator of an estate, has the exclusive jurisdiction of the establishment and allowance of claims against the estates of decedents. No other court of Iowa can entertain a suit or controversy relating to such claims.

Tillman vs. Bowman, Administrator, 68 Iowa, 450.
Shropshire vs. Long, 68 Iowa, 539.

The same legislation regarding claims against estates is contained in the Code of Iowa of 1851, sections 1357 to 1368, and has been in force substantially unchanged since that date. As early as 1858 it was decided by the Supreme Court of Iowa that the establishment of a claim did not warrant *a judgment* against the administrator in the sense in which the term is ordinarily used.

"There is to be an ascertainment of the truth and justice of the claim made against the estate, and when so ascertained *it is to be allowed and ordered to be paid from the assets of the estate. No execution is to be awarded or issued upon the adjudication.* An execution is not the mode pointed out for its enforcement."

Voorhies vs. Eubank, 6 Iowa, 278.
Foteaux vs. Lepage, 6 Iowa, 130.
Little vs. Sinnett, 7 Iowa, 329.

This rule has never been criticised or questioned, but has, on the contrary, been reiterated by the Supreme Court of Iowa under the sections of the statute above quoted, precisely as they now stand.

Smith vs. Shawhan, Administrator, 37 Iowa, 585, decided in 1872.
Dessaint vs. Foster, Administrator, (decided in 1887), 72 Iowa, 640.

It is apparent that upon removal of the claim into the United States Circuit Court, that court must proceed to administer the laws of the state under which the claim of the plaintiff in error arose, and by which it was governed in the state courts. The only order the court below could enter was an adjudication establishing the claim against the estate.

Under such order, and under the provisions of the statutes above set out, the plaintiff in error would simply be entitled to payment pro rata out of the fund arising from the estate of the deceased. What would or could have been realized by the plaintiff in error

from the establishment of his claim out of such fund, is, as has already been stated, purely a matter of conjecture.

But it rests upon the plaintiff in error to establish the jurisdiction of this court affirmatively, before it can proceed in the exercise of its appellate jurisdiction.

Troy vs. Evans, 97 U. S., 3.
Hagan vs. Foison, 10 Pet., 160.
Elgin vs. Marshal, 106 U. S., 580.

And where one of the several creditors interested in a fund appeals, it must appear that the value of his share in such fund is sufficient in amount to confer jurisdiction in this court, or the appeal cannot be entertained.

Terry vs. Bank of Commerce, 93 U. S., 44.
Chatfield vs. Boyle, 105 U. S., 231.

And this court will on its own motion at the hearing, refuse to exercise appellate jurisdiction, unless the requisite facts conferring such jurisdiction appear in the record.

Terry vs. Bank, 93 U. S., 44.
Grant vs. McKee, 1 Pet., 248.
Elgin vs. Marshal, 106 U. S., 578, and cases there cited.

In the last above cited case it is said:

"But the fact of value in excess of the limit must affirmatively appear in the record as thus constituted, as it is essential to the existence and exercise of jurisdiction. This court will not proceed in any case unless its right and duty to do so appear upon the face of its record."

Bruce vs. R. R. Co., 117 U. S., 515.
Opelika City vs. Daniel, 109 U. S., 108.
The Jesse Williamson Jr., 108 U. S., 305.

In this last case, a libel in admiralty, damage was claimed in the sum of $27,000. The offending vessel was appraised at $2,100, and the statutory stipulation for that amount taken. This court said:

"In the present case, although the libelant may recover $27,000 against the vessel because he demands that amount against her, it is plain that he cannot recover on the stipulation for value, which represents her, more than $2,100, and cannot recover against the sureties in the stipulation, more than that amount. Therefore, this being a suit in rem only, the value of the vessel represented by the stipulation is all that is in dispute, because that is all that the libelant can obtain, or the stipulators can lose in this suit."

And this court accordingly dismissed the appeal upon its own motion.

So here, the suit is substantially in rem only, against such fund as the administrator can realize from the estate. And what share of that fund plaintiff in error would be entitled to cannot be made out

from the record. His claim for a much larger amount does not determine that $5,000 is really in controversy in the litigation.

Under these authorities it is submitted that the writ of error must be dismissed for want of jurisdiction.

II.

THE COURT BELOW HAD NO JURISDICTION.

It is obvious from the statutes of Iowa, hereinbefore set out, that plaintiff's claim is, in substance, against the fund which the administrator may realize from the estate of George Greene, deceased, and against such fund only. The claim of plaintiff in error is a mere incident to the marshaling and distribution of this fund. The subject matter of the litigation, and the principal thing in controversy, remains in the hands of the state probate court, to be dealt with by it, administered and distributed by it, in accordance with the laws of the state.

The court below could enter no judgment and make no order interfering with the distribution of the fund in the precise method and manner provided by the state laws, under which the plaintiff in error sought his relief before the appropriate tribunal. It could not issue execution against the defendant in error in his official capacity or otherwise, for the amount of plaintiff's claim, in case it had been established.

A controversy incident to the main cause cannot be removed.

Sewing Machine Co. vs. Sewing Machine Co., 18 Wal., 553.
Same case, 110 Mass., 70.
Bank vs. Turnbull, 16 Wall., 190.

This exact question, under legislation substantially the same, has been decided by the Supreme Court of Massachusetts against the right of removal, in a learned opinion by Gray, C. J., which seems conclusive against the right of removal in this case.

Du Vivier vs. Hopkins, Executrix, 116 Mass., 125.

That this court will upon its own motion, reverse any judgment of the court below where the removal was unauthorized, even though no question was made in the court below, or in this court, as to the right of removal, is settled by repeated decisions.

Stevens vs. Nichols, 130 U. S., 230.
Metcalf vs. Watertown, 118 U. S., 568.
Morris vs. Gilmer, 129 U. S., 315.

It is also settled that such reversal will be at the costs of the party who sought the unauthorized removal, both in this court, and the court below.

Stevens vs. Nichols, 130 U. S., 230.
Mansfield, Etc. R. R. Co. vs. Swan, 111 U. S., 379.

The case last cited is a leading case, not only as to the question of costs, but as to the other question above presented.

If, then, this court shall not dismiss the appeal for want of jurisdiction, defendant in error asks that the judgment below may be reversed at the costs of plaintiff in error, both in this court and in the court below, and that the claim be remanded to the state court for further proceedings therein.

III.

PLAINTIFF CANNOT MAINTAIN ACTION AT LAW.

As between the Railroad Company, the Construction Company, and the deceased, the issue of full-paid stock for the debt, at the rate of twenty cents on the dollar, was a valid and binding transaction. The agreement must be set aside as a fraud upon creditors before any liability can be enforced. No action at law will lie until this is done.

Scoville vs. Thayer, 105 U. S., 156.
Terry vs. Little, 101 U. S., 216.
Bank vs. Francklyn, 120 U. S., 751.
Callanan vs. Windsor, 78 Iowa, 197.

Especially is this so in view of the fact that under section 2421 of the code of Iowa printed supra, the plaintiff cannot prove his claim after twelve months from appointment of administrator and notice thereof, except upon "circumstances which entitle him to equitable relief." These circumstances cannot be submitted to a jury. They are for determination by a court of equity.

Lamm vs. Sooy, 79 Iowa, 597.

The court below, therefore, was correct in directing a verdict for defendant. Plaintiff in error was entitled to no relief at law.

IV.

THERE IS NO LIABILITY ON THE STOCK.

Where the capital stock of a corporation is received in good faith in payment for property, for labor, for the construction of a railway, or is honestly cancelled and released in compromise of existing differences, the shareholder is not liable thereon even as to creditors of the corporation.

"The contract is valid and binding upon the corporation and the original share-takers, unless it is rescinded or set aside for fraud; and while the contract stands unimpeached, the courts even where the rights of creditors are involved, *will treat that as payment which the parties have agreed should be payment.*

Phelan vs. Hazzard, 5 Dillon, 45.

In the case at bar there is no charge or suggestion of fraud in

the pleadings, and not the slightest proof of fraud in the evidence. It is conceded that the parties acted with entire good faith. No taint of dishonesty or obliquity of motive or intent attaches to the the transaction. The facts are simple and undisputed.

The Construction Company paid for the stock in full with its debt, or back of that with $70,000 of construction of the railway company's lines of road.

"The Railway Company was unable to pay the $70,000 in money;" and thereupon it was agreed that it should deliver the Construction Company the stock, "in lieu of said payment," and "in full payment of the indebtedness." (Record 22.)

This was the evidence of the plaintiff in error in the court below. So far from showing fraud it shows a fair and honest transaction.

For defendant in error the insolvency of the Railway Company at the time of the transaction was shown, and also its inability to pay the $70,000, and "that this stock *had* to take the place of a cash payment; that the Construction Company was reluctant to take the stock and *insisted upon payment in cash*; that the stock was not worth anything in the market." (Record 24.)

Under this state of facts the opinion of the learned judge who presided at the trial in the court below, demonstrates conclusively that the payment of the debt of $70,000 by the issuance of this worthless stock, so far from being a fraud or even an injury to either existing or subsequent creditors, was a benefit to both classes. (Record 32 to 34.)

By what sort of magic, then, can this transaction which injured no one but the parties who took this stock and thus wholly lost their debt of $70,000, be transmuted into a further injury to them of $280,000, under the pretense of doing justice to other creditors who have not suffered by this transaction, and who at most can only lose their debts in full, precisely as the Construction Company lost its debt in full? It is just that all of these creditors should fare alike. It is manifestly unjust that one set of the creditors should lose their debt in full and then be punished by a four-fold misfortune for having done so, and this merely that another creditor may not suffer at all.

V.

The decisions of this court maintain the rule for which defendant in error contends. The exact distinction between receiving stock in payment for property, and ordinary cash subscriptions for stock is defined with great clearness and force, as follows:

If it were *proved that actual fraud* was committed in the payment of the stock, *and that the complainant had given credit to the company from a belief that its stock was fully paid*, there would undoubtedly be substantial ground for the relief asked. * * *

"The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the installments have been paid. In that case there is still a debt due to the corpor-

ation, which, if it become insolvent, may be sequestered *in equity* by the creditors, as a trust fund liable to the payment of their debts. But where full paid stock is issued for property received, *there must be actual fraud in the transaction*, to enable creditors of the corporation to call the stockholders to account. A gross and obvious over-valuation of property would be strong evidence of fraud. Boynton vs. Hatch, 47 N. Y., 225; Van Cott vs. Van Brunt, 82 N. Y., 535; Carr vs. Le Fevra, 27 Penn. St. 413."

Coit vs. Gold. etc., Co., 119 U. S., 345.
Bank vs. Alden, 129 U. S., 379.

An honest compromise releasing a stockholder from liability on its stock subscription, has been sustained by this court as against creditors of the corporation upon similar grounds.

New Albany vs. Burke, 11 Wall., 96.

In one of the cases cited with approval by this court in the Coit case supra, it is decided that a railway corporation may in payment for the construction of its lines, issue its stock at its market value, and that a creditor of the corporation cannot assail the transaction on the ground that the stock is not fully paid.

Van Cott vs. Van Brunt, 82 N. Y., 535.

Under these decisions it is plain that the plaintiff in error is entitled to no relief upon the conceded facts in the case at bar.

See also *Aug. and Ames on Corps.*, Sec. 590 a.
Moore vs. R. R. Co., 12 Barb., 156.
Porter vs. Buckfield, etc., R. R. Co., 32 Me., 539.

These last cases hold that for failure to deliver shares of stock due a contractor for constructing a line of railway, the railway corporation is only liable for the market value of the shares.

How, then, can the contractor be liable to the corporation or its creditors if he pays the market value of the shares when compelled to take them in lieu of money due him on his contract?

The following cases sustain the view that only in case of *intentional fraud* will a share-holder be held liable on shares of stock issued in payment for property, or demands against the corporation.

Payment in property:

Re Baglan Hall Colliery Co., L. R. 5 Ch. 346.
Spargo's Case, L. R. 8 Ch. 407.
Hartley's Case, L. R. 10 Ch. 157.
Lake Superior Iron Co. vs. Drexel, 90 N. Y., 87.
Carr vs. Le Fevre, 27 Penn. St. 410.

Payment in *good will* and stock in trade:

Pell's Case, L. R. 5 Ch. 11.
Coate's Case, L. R. 17 Eq., 179.